

NEPA LITIGATION: THE CAUSES, EFFECTS AND SOLUTIONS

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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OVERSIGHT HEARING ON NEPA LITIGATION: THE CAUSES, EFFECTS AND SOLUTIONS

**Thursday, November 10, 2005
U.S. House of Representatives
NEPA Task Force
Committee on Resources
Washington, D.C.**

The Task Force met, pursuant to call, at 10:33 a.m. in Room 1324 Longworth House Office Building, Hon. Cathy McMorris presiding.

Present: Representatives McMorris, Grijalva, Drake, Gibbons, Jindal, Brown, Radanovich, Napolitano, Costa, Pombo, Pearce and Inslee.

STATEMENT OF CATHY McMORRIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Ms. McMORRIS. Good morning, everyone. I would like to call the hearing to order. Here at the beginning, I would like to ask unanimous consent that the gentlemen from Louisiana, Mr. Jindal, and Mr. Melancon be allowed to join the members of the Committee on the dais and participate in the hearing. If there is no objection? Hearing none, so ordered.

This is the first hearing of the Task Force on Updating the National Environmental Policy Act. The mission of this Task Force is to focus on some specific issues and put forth recommendations for updating NEPA. The issue spotlighted today will be NEPA litigation. I have noted the impact of NEPA litigation from the start of the Task Force hearings and believe that thousands of NEPA lawsuits have been the primary cause of the confusion and uncertainty that prevents NEPA from fulfilling its original intent.

The purpose of this hearing is not to lay blame for the effects of NEPA litigation, but to understand why it happens, what it means and what should be done about it. Every agency has had NEPA lawsuits filed against it. The result is that every issue, if not every word, in NEPA has been litigated. However, it is not clear that anything has been settled as a result of these lawsuits. There continues to be a steady stream of lawsuits rehashing many of the same issues.

What is clear is that NEPA lawsuits have become the tool sometimes used to stop or delay Federal government actions. This is best reflected by the comments of Roy Kienitz, Executive Director of the Surface Transportation Policy Project. And I quote, "In the

struggle between proponents and opponents of a highway project, the best an opponent can hope for is to delay things until the proponents change their mind or tire of the fight."

The same mentality was demonstrated by Save our Wetlands. Despite what will be said by some of its defendants, a lawsuit filed by Save our Wetlands stopped the hurricane barrier project in New Orleans. Save our Wetlands made a conscious choice to sue to stop this project and discarded the potential impacts on New Orleans.

Finally, let me address a couple of things you might hear today. You may hear that NEPA suits are not a problem, chiefly because there are not that many and they really do not stop projects. The reality is that it does not matter how many NEPA suits are filed in any one year. It is the effect of these lawsuits that is of concern. For example, there may only be one NEPA-related suit focused on grazing in one specific part of the country, but the effect might be to remove cattle from hundreds of thousands of acres and disrupt the lives of hundreds of cattle growers across the nation.

You may also hear that NEPA lawsuits are part of the process. Indeed, they are part of the process of blocking a project one group may not like, but it is not part of the NEPA process as laid out in the law or its regulations. One of the key elements which everyone values in NEPA is public participation and in keeping with that practice, although we only have six witnesses here today, we do want to hear from everyone. From the very beginning, we have encouraged people to offer their thoughts, their comments, to the Resources Committee so that we can take those thoughts and recommendations into consideration.

Do you have an opening statement? Go ahead, Mr. Grijalva.

**STATEMENT OF RAÚL GRIJALVA, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ARIZONA**

Mr. GRIJALVA. Thank you very much, Madame Chairwoman. I also wish to welcome the witnesses and I look forward to their testimony today. I have serious reservations about the sincerity of this examination of NEPA. This hearing in particular appears to be orchestrated to come to a particular conclusion about the law, which I do not believe is supported by the overwhelming amount of positive testimony we have heard on the law in the hearings around this country.

In addition, I am disappointed that in spite of the Task Force's efforts to closely examine NEPA, our overall Committee continues to pass legislation that waives parts of the law or waives it for particular types of projects. How can we engage seriously in this effort when the leadership of this Committee continues to undermine the law like this? My Democratic colleagues and I engaged in an effort in good faith and I think it is bad faith to continue to pass NEPA waivers while we are doing our work on this Task Force.

As to the content of this hearing before us today, to target NEPA as a cause of devastation in New Orleans is nothing but a blame game to try to shift the responsibility from where it should be. The true causes of the flooding are complicated, but certainly funding Army Corps of Engineer projects to shore up the levies would have helped considerably. But the Administration utterly failed to fund these measures, despite being warned that the hurricane hitting

New Orleans directly would result in massive casualties, economic loss and the devastation that we all witnessed.

Our other policies have exacerbated the dangerous situation the city is in. Wetlands that could protect that city from the worst of the storm surge have been developed or destroyed. Shipping canals have been constructed to make the city extremely vulnerable and that risk has not been adequately protected.

I would also note that before we begin, that several of our witnesses support changing NEPA represent groups that have used NEPA themselves to challenge Federal agency decisions. They claim to dislike the so-called delays caused by environmental review, yet ironically, they also use this law to challenge governmental decisions and advocate for their organizations. Without NEPA, I believe these groups would also find that their right to know what the government is doing and hold that government accountable would be severely curtailed.

Like I said earlier, I look forward to the witnesses. I would submit, I would request, Madam Chairwoman, if we could submit the statement of my colleague, Mr. Tom Udall, for the record? I want to close with something I think he has as part of his statement, Madam Chairwoman. We have stated from the outset that the burden of proof rests with those proposing to change NEPA. So far, nothing in the record developed by this Task Force comes close to meeting that burden, and with that, thank you, Madam Chairwoman, and I look forward to the testimony.

[The statement submitted for the record by Mr. Udall follows:]

Statement of The Honorable Tom Udall, a Representative in Congress from the State of New Mexico

Madame Chairwoman, we join you in welcoming our panel of witnesses and thank them for their time and effort to be with us today.

It is important to note that we are a different Task Force today than at our last meeting. Authority for the original "Task Force on Improving NEPA" has expired and we are now reconstituted as the "Task Force on Updating NEPA."

Unfortunately, more has changed than simply our name. Thanks to actions taken by the full Resources Committee, all pretense of objectivity or open-mindedness in the work of this Task Force has been destroyed.

Despite the fact that this Task Force has not completed its work, the Resources Committee continues to approve sweeping changes to NEPA, each designed to carve special interest exemptions into the heart of the law.

These actions have severely undermined this Task Force's credibility. If our final work product is to be viewed as anything other than a sham, the Majority must stop "reviewing" NEPA with one hand, while gutting it with the other.

The announced topic of today's hearing is, "NEPA Litigation: Its Causes, Effects and Solutions." While we would never want to be accused of a lack of objectivity, the answers to the questions posed by this title are already apparent.

The cause of NEPA litigation is shoddy work by federal agencies. NEPA provides no cause of action challenging the substance of agency decisions. Rather, plaintiffs may only allege defects in an agencies' decision-making process.

Such litigation can become protracted only if, at some point, a federal judge agrees that the Agency's work was defective. While the agencies themselves, along with public land profiteers, would obviously prefer that such defects be ignored, responsible stewardship of our public lands demands better. NEPA litigation ensures that federal agencies move forward with decisions affecting the American people and their lands only after providing the public the opportunity for input and quality of analysis they deserve.

The effects of such litigation are also apparent. In most cases, legal challenges to agency plans under NEPA result in changes to the original proposal which mitigate the environmental impacts and better protect public resources. NEPA litigation improves environmental protection. Period.

Finally, the “solution” the Majority appears to be seeking has already been found. In 35 years, the percentage of agency decisions triggering NEPA that end up in litigation has never exceeded a fraction of 1 percent.

In other words, in more than 99 percent of those cases where an agency is taking major federal action, NEPA serves to avoid a court fight. Through collaboration, extensive public involvement and thorough analysis, NEPA inoculates the vast majority of agency plans from legal challenge. NEPA doesn’t foster litigation. NEPA prevents litigation more than 99 percent of the time. Problem solved.

Madam Chairwoman, we have stated from the outset that the burden of proof rests with those proposing to change NEPA. So far, nothing in the record developed by this task force comes close to meeting that burden.

Thank you.

Ms. MCMORRIS. Thank you. Does anyone else wish to make comments? Representative Pearce?

**STATEMENT OF STEVAN PEARCE, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NEW MEXICO**

Mr. PEARCE. I just wanted to welcome Caren Cowan from my district who is here to testify today.

Ms. MCMORRIS. Absolutely.

Mr. PEARCE. And represents New Mexico well. As far as the burden of proof referred to by my friend from Arizona, I think that the ex-Senator from North Dakota, or South Dakota, Mr. Daschle, who excluded his state from all NEPA processes, he is the one who proves the case. He excluded his forest from any NEPA processes or any lawsuits so that the process can go ahead and I think that is some compelling evidence for all of us to speak to in the country. Thank you, Madam Chair.

Ms. MCMORRIS. Yes, Mr. Jindal?

**STATEMENT OF BOBBY JINDAL, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF LOUISIANA**

Mr. JINDAL. Yes, thank you, Madam Chair. I would just like to briefly welcome two witnesses from my home state who certainly we’re very honored to be joined by Senator Johnston, really the dean of our delegation for many years. He began his life in politics in the Louisiana House of Representatives in 1964 and went to the Louisiana Senate in 1968. In 1972 he became a member of the U.S. Senate where he served our state and our nation through 1997. He was the Chairman of the Senate Environmental and Natural Resources Committee. He led the charge to push through the last Congress a comprehensive energy bill. Thirty years ago there were two plans to protect New Orleans and I know he is going to talk about this and the surrounding parishes, a Barrier Plan and a High Level Plan.

The Barrier Plan was originally chosen because it held up as a result of numerous causes, one of which was NEPA-related litigation. Rather than facing delays, the Corps decided with the High Level Plan instead to raise the existing levies. The Barrier Plan was, at the time, supported by most government officials, including our Senators, as well as the Corps. I would like to thank him today for honoring us with his presence, taking the time to come today to share with us his perspective. I would also like to welcome, next to him is Mr. Bob Winn, a graduate of Loyola Law who also has an L.L.M. in environmental law from Tulane University. As you can see, a partner, recently retired partner—I will let him describe

it, of Sessions, Fishman & Nathan and also the father of a very dear friend of ours. I just wanted to welcome them both. I know they have a very important perspective to share on what has happened in my home State of Louisiana.

So, thank you, Madam Chair, for allowing me to welcome our witnesses.

Ms. MCMORRIS. Yes, anyone else? Well, I too, want to welcome everyone. Senator Johnston, it is very great to have you here. Also on the panel this morning is Robert Winn, an attorney who was directly impacted by the flooding of New Orleans. To give the insight on how litigation affects cattle growers in the Southwest is Caren Cowan of the New Mexico Cattle Growers' Association. To provide the perspective of the national implications of a NEPA lawsuit is Brenda Richards, representing the National Cattlemen's Beef Association and the Idaho Cattle Association. To give us some insight is University of Texas law professor Thomas McGarity. He is also President of the Center for Progressive Reform. Debbie Sease of the Sierra Club will share her views on the nature of NEPA litigation.

I thank you all for joining us today. It is the policy of the Resources Committee to swear in witnesses, so if you will stand and raise your right hand?

[Witnesses sworn.]

Ms. MCMORRIS. Let the record reflect that the witnesses answered in the affirmative. Each witness has been asked to present five minutes in oral testimony. There are lights that will guide you and as we become closer, as we reach that five minute mark, the green light will turn to yellow. As others have stated, yellow means speed up and red means please conclude your remarks. And by doing so, it will allow more time for questions.

Before we get started, I wanted to talk about something that is very important for this hearing. I had invited Mr. Joseph Towers, who is retired general counsel for the Army Corps of Engineers in New Orleans and was someone who was in the room when the Save our Wetlands lawsuit was being tried. Unfortunately, he was unable to attend today, but he did submit a statement and I wanted to include part of it in the record and read a passage that puts this lawsuit and the NEPA litigation issue into perspective. I quote, "If we had been firmly convinced that NEPA was simply a full disclosure law, we would have, perhaps, let it all hang out and moved on and taken our chances on that road. Our engineers were fearful that any delay could result in a major hurricane project completion. Hurricane Betsy had devastated New Orleans on September 9, 1965 and in 1977, most of our staff had been in or observed the horror of flood waters reaching up to the roofs of houses and floating cadavers, some of whom were unrecognizable from bloated decay, in large sections of New Orleans and adjoining parishes.

Faced with the foregoing scenario, it must be noted that responsible and knowledgeable individuals pleaded with Judge Schwartz and the plaintiffs to lift the injunction. After the injunction was issued, I was present in Judge Schwartz's chambers when the U.S. Attorney for Eastern Louisiana told the Judge and the Plaintiff and many others present that his injunction could kill thousands of people. Yet, Mr. Gallingshouse was an expert on hurricane

flooding. He had been President of the New Orleans Levee Board for many years and was well aware of what a powerful hurricane could do to the New Orleans area. The U.S. Congressman for New Orleans, Eddie Heber, who was present, also intervened and pleaded with the Judge. Schwartz was ismissive of these entreaties.

What does the New Orleans experience tell us about NEPA? The Act treats a project such as these projects critical to the survival of hundreds of thousands of people in the same way as one for the expansion of a dam reservoir with no immediate impact on life or death issues. In New Orleans, it gave environmentalists who hopefully may not have understood the consequences of their actions a weapon with which to endanger the survival of people of a major American city." That is part of his testimony that will be entered into the record.

At this time, we will turn to the witnesses. Senator Johnston, if you would begin. It is great to have you here.

[The statement submitted for the record by Mr. Towers follows:]

**Statement submitted for the record by Joseph A. Towers,
Retired Federal Attorney, U.S. Army Corps of Engineers**

I thank you for giving me the opportunity to present this statement to your Committee in lieu of testifying.

My name is Joseph Towers. I am a retired federal attorney. I have served 37 years as an attorney for the Corps of Engineers. Thirty-one of those years, from 1965 to 1996 were spent as the District Counsel for the New Orleans District of the Corps.

The subject of my statement today will concern NEPA's role in the prelude to the disaster that occurred in New Orleans when Hurricane Katrina struck on August 29th 2005 and flooded much of the city.

The story of that disaster begins on a winter day in December 1977, twenty eight years ago. That was a day a federal district court judge, Charles Schwartz, issued an order shutting down work on a Corps of Engineers project to protect New Orleans from hurricane driven floodwaters. I was counsel for the agency in that litigation, *Save Our Wetlands v. Early Rush, et al.*, USDC Ed.La. Civil No. 75-3710.

That project was the Lake Pontchartrain and Vicinity Hurricane Protection project. It was signed into law in 1965. It was in part the result of a powerful and devastating hurricane called Betsy that struck New Orleans on 9 September 1965. Betsy flooded much of Eastern New Orleans, including the now devastated Ninth Ward as well as large parts of St. Bernard, Plaquemines, Lafourche, Terrebonne, St. Charles and St. Mary parishes. However, engineering and design studies for the Lake Pontchartrain project had in fact begun long before 1965. From the very inception of such studies, it was recognized that a principal feature of the project design would have to be the closure of the two natural channels, named the Rigolets and the Chef Menteur, connecting the open waters of the Gulf of Mexico to Lake Pontchartrain, so as to prevent hurricane force winds from driving storm surges into the Lake and then blowing them to the south and into the City of New Orleans, most of which is built below sea level.

As a result, a principal feature of the Lake Pontchartrain project was the construction of two barrier complexes in or adjacent to these natural channels. The barriers were to be massive concrete and steel structures with steel gates that could be lowered at the approach of a storm, shutting off any flows between the Lake and the Gulf, but allowing such flows to occur at normal times. A part of these complexes included the construction of navigation canals and locks to permit the movement of vessels to and from the Lake as well as a system of connecting levees forming a solid line of barriers and levees moving southward from an elevated location in Mississippi called Apple Pie Ridge to connect to other levee systems protecting St. Bernard parish.

As you know, the National Environmental Policy Act went into effect in January 1970. By 1974 the New Orleans District of the Corps of Engineers had prepared a final environmental impact statement for the Lake Pontchartrain project. Shortly thereafter, an environmental association, *Save Our Wetlands*, along with St. Tammany Parish, filed a lawsuit in federal district court seeking to enjoin the Lake Pontchartrain project alleging that the EIS did not meet the requirements of NEPA.

That lawsuit resulted in the 30 December 1977 injunction issued by Judge Schwartz effectively halting the Lake Pontchartrain project.

The cornerstone of the Schwartz injunction faulted the EIS for failing to properly assess, in accordance with NEPA requirements, the effects of the barriers on the marine life of the Lake. This failure was asserted both as to Corps efforts in preparing the EIS and, later, by others, in failing to promptly supplement it with the necessary assessment after the project was enjoined. However, the New Orleans District had painfully come to the realization that it was impossible to achieve NEPA's objectives in both instances within a time frame that would not subject the populations of New Orleans and surrounding areas to the flooding risk resulting from a powerful hurricane..

A main argument of the plaintiffs, adopted by Judge Schwartz in his injunction, was that the barriers would adversely impact shellfish and finfish populations in the Lake because all these populations migrated to and from the Lake either as adults or juveniles, which was true, and that the barrier structures would have interfered with such migrations by reducing the aquatic cross-sections of the natural channels, also true. Our biologists and engineers concluded that to do a credible NEPA study we would have had to minimally fully catalog these populations, establish their migratory patterns at different seasons, and determine in some way the theoretical mortalities that would occur from restricted and greater velocity flows as a result of the barrier structures. They considered a reasonable time frame of several years would not be unthinkable. I recall that there was dialog with the Fish and Wildlife Service and the Louisiana Department of Fish and Game, or whatever it was called at that time, but it was not fruitful. These difficulties had been made known to Judge Schwartz who dismissed their validity.

One must bear in mind that we are talking about the year 1977, about six years after NEPA became law. We were unsure of just what NEPA meant. As of mid-1977 there were about 15 cases in the Supreme Court mentioning or noting NEPA. None of these was particularly illuminating. In fact, in a couple of these the Court had looked the other way rather than agree to implement environmentalist demands. We had received little practical guidance from our general counsel in Washington. If we had been firmly convinced that NEPA was simply a "full-disclosure" law, we would have perhaps "let it all hang out," and moved on and taken our chances on that road. Our engineers were fearful that any delay could result in a major hurricane prior to project completion. Hurricane Betsy had devastated New Orleans on 9 September 1965 and in 1977 most of our staff had been in or observed the horror of putrid flood waters reaching up to roofs of houses and floating cadavers, some of whom were unrecognizable from bloated decay, in large sections of New Orleans and adjoining parishes.

Faced with the foregoing scenario, it must be noted that responsible and knowledgeable individuals pleaded with Judge Schwartz and the plaintiffs to lift the injunction. After the injunction was issued, I was present in Judge Schwartz's chambers when the U.S. Attorney for Eastern Louisiana, Gerald Gallinghouse, told the judge and the plaintiff and many others present that his injunction could kill thousands of people. Mr. Gallinghouse was an expert on hurricane flooding. He had been president of the Orleans Levee Board for many years and was well aware of what a powerful hurricane could do to the New Orleans area. The U.S. congressman for New Orleans, "Eddie" Hebert, who was present, also intervened and pleaded with the judge. Schwartz was dismissive of these entreaties.

Environmentalists have questioned the significance of the 1977 injunction by asserting that the barrier feature would most probably have been worthless in the face of a hurricane of Katrina's magnitude. This may be a valid argument, if we assume that the barrier design parameters of 1962-1965 would have remained frozen in time for 40 years and the Corps had ignored the mounting meteorological evidence of more severe hurricanes like Betsy in 1965 and Camille in 1969 in formulating its project design, a most unlikely scenario. But there is substantial evidence that even the 1962-1965 barrier design might have averted the Katrina disaster. The original barrier design document provided for connecting levees between the barrier structures of 9 to 14 feet above m.l.g. but explained: "This elevation of 9 feet will allow flood surge overtopping for a short period during a hurricane, but this overtopping will not significantly affect the water elevation of Lake Pontchartrain and affect the function of the barrier system." Expert geotechnical engineers now examining the failures at the 17th Street Canal and the London Avenue Canal agree that high water levels spawned by Katrina created unusual subterranean pressures under the walls which caused failure. These high water levels might not have existed even with the 1962-1965 barrier design dimensions in place. Recent NOAA data establish increased severity of the storm surge as one moves further east of the eye toward Ocean Springs, Mississippi. The highest recorded NOAA storm surge

reading was at Ocean Springs, where the sensors failed at 13.26", yet the highest reading for a functioning sensor was at Pilot Station, close to the eye wall, with a surprisingly moderate reading of 7.76", clearly an indication that the storm surges at the Rigolets and the Chef Menteur might have been far more subdued than those that overwhelmed the Mississippi Gulf coast. But the most telling rebuttal to the contention that the barrier feature would have been worthless is the 25 October 2005 report in the New Orleans Times Picayune stating that "The New Orleans District of the Corps of Engineers recently finished the first draft of a Category 5 hurricane protection plan for the New Orleans area. The major goal of the plan, according to officials who have seen it, is to prevent storm surges entering the city through lakes Pontchartrain and Borgne. It would accomplish this with a system of giant levees across exposed and low lying areas, and sea gates across natural passes, shipping channels and canals." [Emphasis supplied]. The "sea-gates" are basically the 1965 barriers.

New Orleans was assaulted by Katrina storm surges coming from two directions, from Lake Pontchartrain to the north and from Lake Borgne to the east. The eastern surge overtopped the Mississippi River-Gulf Outlet canal [also called the MR-GO] levees and the Inner Harbor Industrial Canal levees, flooding much of the Ninth Ward and St. Bernard Parish. The eastern surge would have happened regardless of barriers or sea-gates.

What does the New Orleans experience tell us about NEPA? The Act treats a project such as the Lake Pontchartrain project, critical to the survival of hundreds of thousands of people, in the same way as one for the expansion of a dam reservoir with no immediate impact on life or death issues. In New Orleans, it gave environmental zealots who, hopefully, may not have understood the consequences of their actions, a weapon with which to endanger the survival of the people of a major American city.

I believe NEPA must be fine tuned. But we must be careful not to throw out the baby with the bathwater. The principles of NEPA are indeed essential to enable man to live in harmony with his environment. In the case of projects involving immediate life or death considerations like Lake Pontchartrain and Vicinity, the balancing and disclosure principles of NEPA should still apply but the power of the courts to enjoin such projects should be abrogated. A plethora of different approaches can be considered. For example, a certification program could be enacted into law wherein an agency head could certify such a project as critical to the preservation of human life and thus exempt by law from the threat of injunction without the right to any further judicial review by project opponents.

The above is not new to NEPA history. Ad hoc exemptions to NEPA have been granted by a Congress reluctant to gamble the fate of a project on the role of the NEPA dice. In *Life of the Land v. Brinegar*, 94 S.Ct. 558 (1973), Justice Douglas' dissent notes two instances of this occurrence (as might be expected, with disapproval). The first is the exemption from NEPA contained in the Trans-Alaska Pipeline Act. The second is in the amendments to the Atomic Energy Act of 1954 authorizing the AEC to issue operating licenses regardless of NEPA. There may well be others. However, such individual statutory exemptions are cumbersome and difficult. In neither case noted in *Brinegar* was the project concerned with immediate issues of life or death. Clear enunciation of such a concern as the deciding standard will hopefully diffuse partisan squabbling and promote a sensible and workable approach.

This concludes my statement. I hope I have given you a brief yet incisive picture of one agency component's struggle with NEPA's mandate and I hope my thoughts in regard to this issue will not remain my own.

Thank you.

STATEMENT OF FORMER SENATOR J. BENNETT JOHNSTON

Mr. JOHNSTON. Thank you very much, Madam Chairman, and I am particularly appreciative to Bobby Jindal, someone of whom we are very proud in Louisiana and who is making as great a record up here as he did before he came here.

Madam Chairman, I was on the committee from which NEPA came, which was the old Interior Committee. I had the honor to chair that committee for eight years and served on it for 24 years. And since that time, I have had a lot of experience with NEPA.

First, let me allude to the Barrier Plan of which I was a strong supporter. I was Chairman of Energy and Water Appropriations at

that time, which had responsibility for funding the Corps. Strong supporter of the Barrier Plan. I think it is the plan we need to go to, or a variation on that, to solve New Orleans' problems today. And it was stopped by the NEPA injunction and there was also some environmental opposition on the north shore, from fishermen and others. My colleague, Bob Winn, is a real expert on that lawsuit and he can tell you more about that.

I would like to allude to a couple of problems with NEPA. First of all, let me say I am a strong supporter of NEPA. I think it was designed to make policymakers evaluate the environmental impact of projects and consider alternatives and it has done that very well. But like so much of what we have done in Congress, there have been unintended consequences and the balance needs to be corrected, in my view.

There are four problems with NEPA that I see. First are the vexatious lawsuits which have been made possible by NEPA. Second, the excessive demands for information, which involve huge amounts of money and delay and third, ignored deadlines, and fourth, recalcitrance on the part of a few Federal employees. I would like to suggest, Madam Chairman and members, that one way to deal with this and which was dealt with very successfully, was by the White House Task Force on the streamlining of energy projects. It was created by executive order under Bush II and it worked very well. Bob Middleton headed that up and it did not have any real powers. What it could do is, for example, in a project where you are required to excessively provide information, and I am involved in a project now where demands have been made which could take years and many millions of dollars on an L&G project, which is vital to the nation. That kind of task force can come in and examine the request for information and bring in, make it more reasonable.

The same thing is true of deadlines. On this project, L&G project, supposed to be completed by statute in 356 days. What do they do when they want to delay it? They stop the clock. What does that mean? You just stop it. They are not responsible to anybody and as a supplicant, that is, an applicant, you are not in the position to complain about stopping a clock or the delays. The same thing is true about recalcitrance employees who simply disobey the law. I could give you examples on that, but, I mean, we know they exist. If you have somebody, an ombudsman with the Federal government, which the White House Task Force was able to do, they can make these employees responsible. It could be done by statute. I do not know why the Administration stopped it in the second Bush. It was working very well, but I suspect there were complaints from some of the Federal agencies that did not want to be overseen, did not want to have to justify further delay, did not want to have to justify demand for unnecessary or irrelevant information. But I would very much like to see that reinstituted, either by statute or by executive order. Thank you very much, Madam Chairman.

[The prepared statement of Mr. Johnston follows:]

**Statement of The Honorable Bennett Johnston,
Former U.S. Senator, State of Louisiana**

Chairman McMorris, Ranking Member Udall and members of the Task Force on Improving the National Environmental Policy Act; my name is Senator Bennett

Johnston of Louisiana and I served in the United States Senate for 24 years. I served as Chairman and Ranking Member of the Senate Energy and Natural Resources Committee from its creation. Besides participation in countless battles on energy policy I have overseen debate on operations of Federal lands and territories of the United States. I hope that I can be of use to the Committee in discussion pertaining to the amendment of the National Environmental Policy Act (NEPA).

Since its passage some 35 years ago, I believe NEPA has accomplished the goals for which it was designed. The legislation requires that the effect on the environment of every major federal action be assessed and that all the alternatives to that action are examined in advance; thereby allowing policymakers to make intelligent choices among the options presented before them.

In these ensuing years many proposals have been exposed to this critical analysis and have been found to be environmentally, economically, or socially deficient resulting in their termination. Viewing this as a great accomplishment, I would strongly urge that this central purpose of the Act be preserved and if possible, streamlined and strengthened.

Despite the achievements of the legislation, litigants and dissenting bureaucrats have exploited the bill to kill projects by vexatious, expensive delay, and unnecessary administrative requirements. These unintended consequences within the legislation are bad for our nation and should be remedied. To use the popular phrase, these actions have led to "paralysis by analysis".

Separate pieces of legislation are now making their way through Congress that address the Nation's critical need for electric transmission, refineries, Liquefied Natural Gas (LNG) facilities and flood protection, among others. The challenge this Committee faces is to seek the correct balance between needed analysis against unnecessary, expensive and often fatal delaying tactics.

For example, in December 2004, The National Petroleum Council, a federal advisory Committee of the Department of Energy, issued a report on U.S. refining revealing how refining investment money, as well as top engineering resources, have been diverted from capacity expansions into meeting heavy regulatory requirements. Up until the year 2000, refining capacity grew at about 1.5 % a year. Since 2000, capacity growth has dropped to less than 1% a year due to multi-billion dollar regulatory requirements. I bring this report to the Committee's attention because it contains the very best and most factual information on the refining industry.

The misuse of stall tactics is not a present day phenomenon. In the 1970's, Congress considered a bill that would have expedited critical energy projects. It failed by the narrowest of margins and we find ourselves in critical need of projects which that bill was designed to expedite.

I believe that the problem with NEPA lies in four areas:

The first of which is litigation abuse. Lawyers have learned to game the system by using legal proceedings to delay and thereby frequently frustrate the process. I am advised that when suits against the Corps of Engineers get to judgment the Corps wins 93% of the time. However, this percentage is a misrepresentation of the truth because many projects are simply abandoned due to the expense and delay of litigation.

In New Orleans in the 1970's the "Barrier Plan" for the Lake Pontchartrain Vicinity Hurricane Protection Project was designed to prevent the tides and storm surges in Lake Pontchartrain and Lake Borgne from reaching dangerous levels. I believe those surges were one of the direct causes of flooding in New Orleans during Hurricane Katrina. I, along with most of the government jurisdictions in the area, including the Corps, strongly supported this proposal. However, the plan was stopped by a NEPA injunction along with opposition from local parties. The issues in that case are complicated, but the result of its outcome is all too plain to see, because, I believe that plan would have prevented the flooding in New Orleans.

The second problem with NEPA results from excessive demands for information—much in the form of "modeling" in Environmental Impact Statement proceedings. I am presently involved in a NEPA proceeding involving an LNG terminal where the demands of agencies for irrelevant or unnecessary information could cost many millions of dollars and involve years of delay.

The problem here is that when you are seeking a permit and agencies must sign off on that permit, the applicant is not in a good position to object to excessive demands of those agencies.

In May of 2001 the President established by Executive Order the White House Task Force on Streamlining Energy Projects, operating with the support of the Vice President. The Task Force was directed by Bob Middleton, a former Chief of Staff and Project Officer at the Minerals Management Service. Although he was not armed with statutory powers, his inquiries had a great persuasive effect upon the agencies; which was uniformly praised by those seeking to build needed energy

projects. Why the Task Force was not continued during this Congress is a mystery, but one can guess that the agencies did not want to have to justify or defend their exercise of discretion. Applicants for licenses are in a poor position to question delay or unreasonableness of the issuing agency. The task force could do so without prejudicing the standing of the applicant.

The third problem is simple delay. Agencies often do not adhere to the deadlines that they set for themselves. When the government wants a delay, it simply "stops the clock". In the case of LNG projects, the law requires a one year application assessment process. However, this process is not guaranteed to reach fruition within the one year time limit due to lengthy delays beyond the control of the applicant. When additional time is needed, the agencies should have to justify their extension before the Task Force, if reinstated, the courts, the Council on Environmental Quality, or some other appropriate forum.

Finally, there is a recurring problem of recalcitrance on the part of a few Federal employees who happen to oppose a project and use their power inappropriately to deny the permit. I am a strong supporter of government employees, most of whom are true public servants. Although, when they ignore the law and use their power inappropriately to deny a permit, there ought to be some redress other than the expensive and time consuming process of a lawsuit. Again, reinstating the Task Force, an overseer, or an ombudsman could prove helpful.

In summary, I would praise the Committee for addressing the important issues that face the Task Force in amending NEPA. For the most part, NEPA has proven to be a useful and integral piece of legislation in protecting our environment from needless and harmful expansion projects. However, it has allowed certain parties who oppose any and all projects to litigate haphazardly in efforts to stall projects that are of necessity. I would suggest and support the efforts of Congress to halt the abuses of litigation; reduce the demands by agencies for information by reinstating the White House Task Force on Streamlining Energy Projects, which could also serve as an oversight group for government employees; and force an adherence to deadlines by Agencies.

Thank you again for this opportunity and I would be happy to answer any questions that the Committee may have.

[Senator Johnston's response to questions submitted for the record follows:]

December 1, 2005

The Honorable Cathy McMorris
United States House of Representatives
Committee on Resources
Washington, DC 20515
Dear Chairwoman McMorris:

Thank you for the opportunity to testify before your committee on November 10, 2005. In response to your questions I submit the following:

1. "What effect has NEPA litigation had on Louisiana?"

As I testified before the committee, a NEPA injunction stopped the "Barrier Plan" from going forward. Its construction might have prevented the flooding in New Orleans.

2. "Do you believe that NEPA-related litigation will negatively impact the post hurricane reconstruction projects like an integrated plan for flood control and protection against a Category 5 hurricane?"

I do not believe it is possible to calculate the effect that NEPA-related litigation can have on post-hurricane reconstruction projects.

Please feel free to call upon me if you have any further questions.

Respectfully yours,

J. Bennett Johnston

**STATEMENT OF ROBERT E. WINN, PARTNER,
SESSIONS, FISHMAN & NATHAN, LLP**

Mr. WINN. Thank you, Madam Chairman. I am here today to make some personal observations about NEPA litigation and the personal observations about the effect of NEPA litigation. I

evacuated New Orleans on the morning before the hurricane, Hurricane Katrina, struck New Orleans. I went to Alexandria, Louisiana. While there, I witnessed and observed a lot of the same television programming that you all observed and was horrified at what I saw.

Almost as a sort of therapy, I decided to write an article which I circulated to a number of friends. I entitled the article, "New Orleans, America's Pompeii. Did environmentalists and the Corps of Engineers destroy the city?" Well, in the circulation of my article to a lot of friends, one was a practicing attorney here in the District at Arent Fox, who followed it to one of the committees, Senate and House committees, actually, and thus I have been invited to appear before you to talk about the effects of NEPA litigation, particularly the "Save our Wetlands v. Rush" case of 1977.

My home in New Orleans was, is, at ground zero for Hurricane Katrina. It is located in the northwest corner of the city, about 100 yards back from the levee built by the Corps of Engineers to protect the city from hurricanes. I might add that the 17th Street Canal, which has been spoken of, the break in the 17th Street Canal, occurred about 1200 yards as the crow flies, from my front door. A lot has been said and a lot has been written about the devastation, and it is horrendous devastation, in New Orleans East and in the lower 9th Ward. I can tell you, too, though, that Lakeview, an area about four to five blocks from where I live, Lakeshore, some 15,000 homes minimum have been destroyed. It is a wasteland. I do not think there is any chance or hope those people ever have of recovering from it.

I should also point out that it was not a levee break but a failure of the flood wall on the 17th Street Canal that resulted in all the flooding that you observed on television that engulfed Charity Hospital, the Superdome and spread into Midcity and uptown New Orleans.

I am not here, by the way, I am not here to recount the damage and the extent of the devastation to New Orleans. But I am here to suggest that the NEPA litigation, the case that I just referred to, is responsible for and could arguably be said to have caused, at least greatly contributed to the devastation in the City of New Orleans.

When I moved to the Lakefront in New Orleans in 1977, there was a levee in front of my house about 100 yards away, about ten or 11 feet high. After a few years, that levee height and its width was increased to about 22 or 23 feet. I was a little bit disappointed, because my view was curtailed and, of course, there is a lot of inconvenience while they built that levee. Unfortunately, there had been a dispute between the Corps of Engineers and the environmentalists. The Corps of Engineers had wanted to build a Barrier Plan, a system of locks and dams and floodgates to protect against storm surges coming into Lake Pontchartrain and threatening the city. Unfortunately, the environmentalists prevailed and they were able to have the construction of that system of floodgates enjoined, even though the Corps made it very clear that the increased size of the levees, even to 22, 23 feet, would in no way be sufficient to protect against a serious storm, what we would now call a large category three or category four or five storm.

The environmentalists at the time were very concerned about salt water intrusion into the lake. They appeared to be much concerned about the welfare and the habitats of gulf fish and alligators than the people of New Orleans. The environmentalists prevailed in the dispute by utilizing various procedural instruments in the law. They made no claim that the Barrier Plan, that the floodgates would not work. They complained, rather, that the environmental impact statement prepared by the Corps of Engineers and even modified and revised by the Corps of Engineers was inadequate. In fact, the trial judge was very concerned and expressed his chagrin at what he considered an inadequate presentation by the Corps of Engineers' environmental impact statement.

So in 1977, the Lock and Dam Project as it was called then, or the Floodgate Project, was enjoined. The Corps did not appeal and rather it chose to abandon the Lock and Dam hurricane protection. It elected instead to increase the size of the levee. The Corps' rationale seemed to be, and this was discussed back in New Orleans at the time, well, we have \$100 million to spend. The environmentalists will not let us do what we think will be required. We will go ahead and spend the money anyway and then they increased the levee size.

Ms. MCMORRIS. Mr. Winn, I need to ask you to wrap up.

Mr. WINN. All right, unfortunately, the NEPA litigation, which I said is not a reported decision, but it is available. It is available and I provided the Internet address for you and I encourage you to read it, because it makes it very clear that it was the Judge's concern about procedural objections to the impact statement that stopped and enjoined the project.

[The prepared statement of Mr. Winn follows:]

**Statement of Robert E. Winn, Partner,
Sessions, Fishman & Nathan, LLP, New Orleans, Louisiana**

My home in New Orleans was (is) at ground zero for Hurricane Katrina. It is located at the northwest corner of New Orleans, facing Lake Pontchartrain. It is located about 100 yards from the levee constructed by the Corps of Engineers to protect New Orleans from flooding. My home is on the rim of the bowl where New Orleans is located.

Additionally, my home is about 1200 yards, as the crow flies, from the 300 foot breach in the 17th Street Canal floodwall. Facing the lake from my front steps, the breach in the 17th Street Canal floodwall was to the southwest of my home. Fortunately my family and I evacuated New Orleans for Alexandria, Louisiana in the early morning of Sunday, August 28, 2005. Katrina made land fall southeast of New Orleans the morning of Monday, August 29, 2005.

My home is in West Lakeshore, an area adjacent to Lakeview, about 6 blocks away from my home. Although a lot has been said about the devastation in the lower 9th Ward and in Eastern New Orleans, there has been relatively little mention of the devastation of the Lakeview area. Approximately 15,000 homes in Lakeview were flooded at depths up to 10 feet, and the entire area remains completely uninhabitable—a wasteland; most of the homes will have to be demolished. The damage to Lakeview resulted from the breach of the 17th Street Canal. Significantly, the flooding of mid-town and down-town New Orleans, and large portions of uptown and areas of Jefferson Parish was caused by the 17th Street Canal break. The water engulfing Charity Hospital and threatening the Superdome was from the 17th Street Canal.

I am here today not to recount the damage to New Orleans, but to provide you some history, from a personal viewpoint, about the hurricane protection for New Orleans and particularly the city's continuing vulnerability to catastrophic flooding, arguably the result of NEPA Litigation.

When I moved to the New Orleans Lakefront in 1977 there was a levee about 12 feet high, a hundred yards or so from my home. Standing at the front door, I could

see over the levee to the park on the other side and see sailboats on the lake. A few years later, the early 80's as I recall, the levee size was substantially increased in height and width, to a height of approximately 22-23 feet. I regretted the loss of the view of the lake, but I was content with the idea that I was benefited by increased protection from flooding caused by a hurricane.

I remember hearing about a dispute between the U.S. Corps of Engineers and various environmental groups relating to the levee construction. The Corps wanted to construct a lock and dam project with floodgates to control the flow or the surge of water from Lake Borgne through the Chef Menteur and Rigolets passes into Lake Pontchartrain and into New Orleans. The environmentalists worried about damage to the ecology. It seemed they were particularly concerned about endangering the habitats of garfish and alligators.

Somehow the environmentalists prevailed, and the lock and dam project with the floodgates was abandoned and the Corps of Engineers opted instead for a "high barrier plan", whereby the levees would be strengthened and raised. Earthen levees protect against flooding from the Mississippi River and the lake. An essential and integral part of the system are the floodwalls bordering drainage canals running through the city and into the lake. It would be a mistake to say there are levees along the drainage canals. The canals are hemmed in by earthen walls, perhaps reinforced with sheetpile and sometimes topped with concrete. The breach in the 17th Street Canal which caused the great devastation occurred on the eastern or New Orleans side of the canal, about 600 yards from where the canal enters Lake Pontchartrain.

It wasn't until some years later, perhaps 1991, that I learned just how the environmentalists had prevailed in their dispute with the Corps of Engineers. They utilized provisions of the National Environmental Policy Act (NEPA) and its procedural requirements to stop construction of a lock and dam project designed to control storm surges into Lake Pontchartrain. The Corps had studied, planned, and in the mid 70s was in the process of constructing a series of locks, dams, and floodgates at the Chef Menteur and Rigolets passes connecting Lake Pontchartrain to Lake Borgne and the Gulf of Mexico. The project would control or at least mitigate any storm surge. Environmentalists sued using NEPA and sought to enjoin construction of the project. After a trial in the Eastern District of Louisiana, by order of December 30, 1977 the Corps was enjoined from any further construction at the Chef and Rigolets. The court's order specifically cited problems with the Corps' environmental impact statement as the reason for the injunction.

The Corps did not appeal and chose to abandon its lock and dam hurricane protection project. The Corps elected instead to increase the size of the levees even though the Corps acknowledged that increasing the levee size would not be sufficient to protect against a massive storm, what we would now refer to as a large category 3 or a category 4 or 5 hurricane.

In the early 1990s I enrolled in the Masters Program in Environmental Law at Tulane University Law School. I received my Masters in Environmental and Energy Law in May of 1992. One of the courses taken involved NEPA, and the professor put a number of sample environmental impact statements on reserve in the library for students to review as models and guides. One of the environmental impact statements was the Corps' high barrier plan. The Corps readily admitted that the increased levee size would not protect the city from a large category 4 or 5 storm and it seemed that the Corps' rationale for proceeding with the high barrier plan was simply that it had \$100 million to spend and it might as well use it to increase levee size. I remember feeling that I had lost my view of the lake for no good purpose—the old levee was sufficient for all ordinary hurricanes, but not "the big one". I lost my view of the lake and experienced the inconvenience, noise, and dirt and dust of the levee construction for no real purpose because the increased levee size would not protect against "the big one".

Would the lock and dam project undertaken by the Corps have prevented or lessened the devastation caused by Katrina? Obviously the Corps of Engineers thought so because it was proceeding with construction until it was enjoined by the United States District Court For the Eastern District of Louisiana in 1977. The precise reason assigned by the trial judge was that the final environmental impact statement presented by the Corps of Engineers was inadequate because of omissions and procedural inadequacies. The court specifically found in its concluding paragraph, highlighted no less, that its opinion enjoining further work on the Corps' project "should in no way be construed as precluding the Lake Pontchartrain Project as proposed or reflecting on its advisability in any manner". The court's opinion was strictly limited to its finding that the environmental impact statement of August 1974 for the project was legally inadequate. The district judge continued "Upon proper compliance with the law with regard to the impact statement this injunction will be

dissolved and any hurricane plan thus properly presented will be allowed to proceed". For some reason, as is apparent from the judge's opinion, the Corps failed to adequately address the court's concerns about the environmental impact statement. For some reason the Corps, even after the injunction, failed to remedy the deficiencies in the Final Environmental Impact Statement (FEIS). What is clear is that the high barrier plan implemented by the Corps in lieu of the lock and dam plan did not work, resulting in the horrendous consequences to the City of New Orleans and its people.

The court's opinion in civil action 75-3710, consolidated with civil action number 77-976, is not a published opinion but it is available at <http://www.saveourwetlands.org/77‑Schwartz.htm>. The action is entitled Save Our Wetlands, Inc. et al vs. Rush et al.

The opinion presents a very readable and straight forward discussion of how a project so potentially important to the welfare of the City of New Orleans was side-tracked by environmentalists using procedural objections to the environmental impact statement submitted by the Corps of Engineers. Indeed the Corps, its lawyers, and environmental staff may deserve some blame. The law should be reconsidered to provide protection against the misuse of procedural provisions. At the very least, the required cost/benefit analysis should require a broader and more comprehensive weighing of costs and benefits. At the trial of the injunction the economic benefit of development and urbanization was weighed against potential harm to the ecology of the Lake Pontchartrain estuary. Somewhere, somehow, the law must insure a full assessment of damages and potential consequences to include such potential benefits as the protection of the lives and property of the people of New Orleans.

We do not know if the Corps' plan or any such plan for locks, dams and flood gates would work. We do know that the Corps thought it would work and was in the process of investing millions of dollars of taxpayer funds when its construction was stopped. In recent weeks there have been references to a floodgate system that protects the Netherlands. I have also heard that Italian engineers are considering a system of flood gates to protect Venice.

One thing should be evident. Although larger and stronger levees and floodwalls should be part of any hurricane protection system, no system of levees and floodwalls can ever be fully adequate. Just as it would be impossible to have enough police patrols to protect against any terrorist attack, anywhere, it is submitted that levees and floodwalls cannot afford adequate protection to New Orleans. A chain is only as strong as its weakest link. In addition to the levees on the Mississippi and Lake Pontchartrain there are 200 miles of floodwalls flanking drainage and navigation canals in New Orleans. There are 2 sides to every canal, 400 miles of floodwall. The wall on the western side of the 3 to 4 mile long 17th Street Canal could just as easily have failed as the wall on the eastern side which did fail. Subsidence and the unusual qualities of Louisiana soils make for a dynamic and ever changing situation which would require constant monitoring and revision of floodwalls and levees.

Another system, perhaps the one decided upon by the Corps of Engineers being constructed in the 1970's until enjoined by environmentalists using NEPA, should be employed along with the upgrading of levees and floodwalls to protect New Orleans. The people of New Orleans and the American people should not be expected to just hope that it will be a hundred years before another "big one" strikes New Orleans.

The subject under consideration by your committee is "NEPA Litigation: The Causes, Effects and Solutions". The Save Our Wetlands vs. Rush case is an example of NEPA Litigation wherein one judge, a group of environmentalists and lawyers for environmental organizations and the Corps of Engineers were able to scuttle a long studied project of the Corps for hurricane protection of New Orleans. Is the massive devastation caused by Hurricane Katrina an effect of that NEPA Litigation?

See: The Creeping Storm, by Greg Brouwer, June 2003, Civil Engineering; <http://www.pubs.asce.org/ceonline/ceonline03/0603feat.html>.

See: New Orleans, America's Pompeii, Did Environmentalists and the Corps of Engineers Destroy the City? By Robert E. Winn, September 2005

Response to questions submitted for the record by Robert E. Winn, Partner, Sessions, Fishman & Nathan, LLP, New Orleans, Louisiana

In response to your questions I submit the following:

1. As a lawyer and someone from the area affected by the flooding, in your opinion, do you think that the court properly balanced the need to protect the garfish with the need to protect against property damage and other adverse affects to people of New Orleans?

I do not believe the court properly balanced the needs of marine life against the welfare of citizens of New Orleans. The problem with NEPA is that it permits an unelected judge to thwart the will of the Congress and Corps under the guise of a procedural ruling. Moreover, the court's decision was dependent upon the apparently less than stellar efforts of counsel. The garfish were represented, not the people of New Orleans.

2. Do you believe that NEPA-related litigation will negatively impact the post hurricane reconstruction projects like an integrated plan for flood control and protection against a Category 5 hurricane?

I anticipate NEPA-type litigation will plague post-hurricane reconstruction projects and future flood control.

3. You note that the SOWL case is an example of a Corps project that had been studied and studied being scuttled by NEPA litigation. How can the law be improved to prevent this from happening?

Amend NEPA to not allow such easy access to federal jurisdiction. Why not return to tort and nuisance law where the constituents are the citizens? Give the environmentalists great administrative access, but not the hammer of a federal injunction.

Ms. MCMORRIS. Thank you. Ms. Richards?

**STATEMENT OF BRENDA RICHARDS, FEDERAL LANDS
COMMITTEE CHAIRMAN, IDAHO CATTLE ASSOCIATION AND
IDAHO DIRECTOR, PUBLIC LANDS COUNCIL**

Ms. RICHARDS. Chairman McMorris and members of the Task Force, I would like to thank you for giving me this opportunity to discuss NEPA. My name is Brenda Richards. I am testifying today on behalf of the Public Lands Council, the National Cattlemen's Beef association and Idaho Cattle Association. Alongside my husband and three sons, I operate a family owned cattle ranch in Reynolds Creek, Idaho. My sons follow in the footsteps of five generations of ranchers. We want nothing more than to be able to pass this business on to our sons so this heritage can continue. However, our ability to do this hangs in a delicate balance. No matter what level of planning we undertake, the business that we have worked on and built up over the years could be taken away from us with the stroke of a judge's pen.

In my county, Owyhee County, the Federal government owns over 76 percent of the land. Public lands are critical to the functioning of the livestock industry in the west. Federal laws such as NEPA allow individuals in extremist organizations in Idaho and across the west to gain control of the Federal lands and take the decisionmaking ability away from the Federal agencies. Much of this problem could be remedied by clarifying NEPA and other such laws. Recent litigation in southwest Idaho illustrates this point.

On July 29, Judge Winmill of the Federal District Court in Idaho, entered an injunction against the BLM enjoining all grazing on 28 allotments divided among 11 permittees in the Jarbidge Resource Area until a single EIS and record of decision is completed for the grazing. This is "Western Watersheds Project v. Bennett." This injunction would have removed almost 100,000 AUMs from public lands, affecting approximately 800,000 acres.

The Court greatly overstepped its bounds in issuing this decision. According to the Court, the BLM found the Fundamentals of Rangeland Health to have been violated for all 28 of the allotments. In actuality and even by the Court's later admission, the BLM standards were not met on only 14 of the 28 allotments. And

more importantly, the determinations of standards not met and livestock a factor do not mandate the shutdown of grazing.

If the injunction were to have remained in place, most of the 11 permittees would either have been forced to liquidate their herds or completely sell their ranches. Because of these fears, the permittees felt their only option was to enter into a settlement agreement in which their permitted numbers were greatly reduced and the activist anti-grazing organization was handed a significant role in management of the allotments. This court case overturned a significant portion of the grazing industry in this area, simply because the government failed to complete paperwork required by NEPA.

We strongly support multiple use sustained yield of public lands and the related consideration of environmental factors in processing grazing permits. However, we also strongly believe that a more sensible balance must be struck between environmental paperwork and the actual conservation as this dynamic relates to grazing.

Given scarce financial resources that the land management agencies have to carry out this important work, it only makes sense for the funding to be focused as much as possible on producing tangible results by managing the resources on the ground. Part of the agencies' challenge in completing the environmental documentation can be addressed by more closely tailoring the paperwork requirements to the actual environmental profile presented by grazing or an activity ancillary to grazing. We strongly urge this Committee to consider enacting legislation that provides for categorical exclusions to be available for such classes of grazing activities.

We also believe that categorical exclusion should be made available for range improvement, such as the installation of fencing or water facilities. These activities have a minimal impact on the land, but can play a critical role in putting in place a well managed grazing program that results in important benefits for the resources.

Additionally, NEPA as it currently stands, prevents permittees from substantively intervening in litigation in which their grazing permits are in question. The consequences of an agency failing to adequately conduct NEPA never wholly falls on the agency. Rather, it is the permittee who bears the brunt. Because of this, they should be able to fully engage in the courtroom when their permits are at risk.

An issue that could be key in preventing the devastating litigation would be in clarifying in code that the agency needs to be allowed to exercise its expertise on its own NEPA documents and in its own administrative appeal process before the issue is taken to Federal court. An exhaustion of administrative remedies must occur.

In conclusion, as a rancher, I support this Task Force in its efforts to review and revise NEPA. Members of the Idaho Cattle association, the Public Lands Council and the National Cattlemen's Beef Association understand that environmental impacts of Federal activities should be considered prior to undertaking the activity and the public should be given the opportunity to participate in the process for considering these environmental impacts.

However, in the year since NEPA has been enacted, it has been applied in a way that must be at odds with the intent of the original authors of the Act. I encourage you to move forward so that my family and countless other ranching families across the west can continue our rich heritage for future generations. Thank you.

[The prepared statement of Ms. Richards follows:]

**Statement of Brenda Richards, Federal Lands Committee Chairman,
Idaho Cattle Association, and Idaho Director, Public Lands Council**

Chairman McMorris and members of the Task Force, thank you for giving me this opportunity to discuss the National Environmental Policy Act. My name is Brenda Richards. I currently serve as Federal Lands Committee Chairman for the Idaho Cattle Association, a statewide organization representing the interests of Idaho's ranchers, and as the Idaho Director to the Public Lands Council, a national organization representing sheep and cattle ranchers in 15 western states whose livelihood and families have depended on federal grazing permits dating back to the beginning of last century. I am testifying today on behalf of the Public Lands Council (PLC), National Cattlemen's Beef Association (NCBA), and the Idaho Cattle Association (ICA).

Alongside my husband and three sons, I operate a family-owned cattle ranch in Reynolds Creek, Idaho. My sons follow in the footsteps of five generations of ranchers. It is at the front of our minds every day, as we work on our ranch, that we want nothing more than to be able to pass this business on to our sons so that this heritage can continue. However, our ability to do this hangs in a delicate balance. No matter what level of planning we have undertaken, the business that we have worked on and built up over the years could be taken away from us with the stroke of a judge's pen.

In a state like Idaho, it would be impossible to sustain a ranching operation, such as ours, without the use of public lands for grazing. In my county, Owyhee County, the federal government owns over 76% of the land. Nearly 40% of all cattle raised in the West spend some of their lives on public land allotments. The public lands are critical to the functioning of the livestock industry in the west. There are individuals and extremist organizations in our state and across the West who know this fact and have learned how to manipulate and distort the law in order to achieve their activist, destructive agendas. Through federal laws such as NEPA, they have essentially gained control of the federal lands and have taken the decision-making ability away from the federal agencies. In a system that is supposed to be fair and impartial, they have found judges who are almost certain to rule in their favor. Much of this problem could be remedied by clarifying NEPA and other such laws.

Recent litigation in southwest Idaho illustrates this point. On July 29, Judge Winmill of the Federal District Court in Idaho entered an injunction against the BLM enjoining all grazing on 28 allotments divided amongst eleven permittees in the Jarbidge Resource Area until a single EIS and Record of Decision is completed for the grazing (Western Watersheds Project v. Bennett, No. 04-0181). This injunction would have removed almost 100,000 AUMs from public lands affecting approximately 800,000 acres.

The court greatly overstepped its bounds in issuing this decision. According to the court, BLM found the Fundamentals of Rangeland Health to have been violated for all 28 of the allotments. In actuality, BLM found only in a minority few that some standards were not met and that livestock was a cause, and that only occurred, even by the Court's admission, on 14 of the 28 allotments. More importantly, the "determinations" of standards not met and livestock a factor, only required of the BLM to make corrective action by the start of the next grazing season through issuance of the Final Grazing Decisions, which is precisely what BLM did. The rules do not mandate a shutdown of grazing if a "determination" is made of standards not met and livestock a factor.

In issuing new grazing permits, BLM issued four Environmental Assessments. The Jarbidge Resource Management Plan provided that increases in grazing would not be authorized until "wildlife goals and watershed needs" were satisfied. In spite of the facts, the court ruled that BLM violated NEPA and FLPMA. As most relevant here, the court ruled that BLM violated NEPA by failing to consider the cumulative impacts of reauthorized grazing; and, by issuing an EA and not EIS in the face of the uncertain information about the status of the sage grouse and incomplete details regarding compliance with the Fundamentals of Rangeland Health.

If the injunction were to have remained in place, most of the eleven permittees would either have been forced to liquidate their herds or sell out completely. The

impacts from this would have increased exponentially across the area—one of these affected permittees alone has four sons and their families working on the family ranch. Because of these fears, the permittees felt their only option was to enter into a settlement agreement in which their permitted numbers were greatly reduced and the activist anti-grazing organization was handed a significant role in the management of the allotments. A significant portion of the grazing industry in southwest Idaho, and the families and communities that depend on it, was overturned through this court case simply because the government failed to complete the paperwork required by NEPA.

Grazing permit administration remains a challenge that trips up government agencies in other respects as well. Because the agencies were not able to complete NEPA documentation in time to renew expiring permits, industry was forced to seek relief from Congress which fortunately responded. Fortunately, Congress has enacted a number of provisions intended to address this. The agencies are running behind the schedule by which Congress expected them to make up their backlog in NEPA for grazing permits.

As a general matter, PLC, NCBA, and ICA do not seek relief from NEPA or other environmental laws. On the other hand, it seems wrong to us that our members' livelihoods should be interrupted and harmed because the agencies are not able to complete their statutorily mandated paperwork. It is hard to imagine that the authors of NEPA would have intended to harm personal businesses, lives, and communities. But the cumbersome consideration of environmental consequences mandated by NEPA leaves public land ranchers on a precipice of uncertainty.

This cannot be allowed to be the standard of business for the government. Businesses, families, and communities cannot fail because the government does not complete paperwork. Particularly, paperwork that does little to affect conservation on the ground, and certainly adds little to a ranching operation cannot be allowed to harm the public. We strongly support the multiple use sustained yield of public lands and the related consideration of environmental factors in processing grazing permits. However, we also strongly believe that a more sensible balance must be struck between environmental paperwork and actual conservation as this dynamic relates to grazing. Given the scarce financial resources land managing agencies have to carry out their important work, it only makes sense for funding to be focused as much as possible on producing tangible results by managing the resource on the ground.

Part of the agencies' challenge in completing environmental documentation can be addressed by more closely tailoring the paperwork requirements to the actual environmental profile presented by grazing or an activity ancillary to grazing. For example, it seems irrational to produce full-scale NEPA documentation for longstanding continuing activities that have long-ago made their imprint on the landscape. Once the environmental baseline has been established in environmental analysis and no new information emerges as demonstrated through a program of regular monitoring, what sense does it make to spend scarce federal resources on additional NEPA documentation? We strongly urge this Committee to consider enacting legislation that provides for categorical exclusions to be available for such classes of grazing activities.

We also believe that categorical exclusions should be made available for range improvements such as installation of fencing or water facilities. These activities have a minimal impact on the land but can play a critical role in putting in place a well-managed grazing program resulting in important benefits for the resources.

The Jarbidge litigation is just another of many examples in which the courts, and activist judges have trumped Congress. Last year, Congress enacted P.L. 108-108. In Section 325 of this law, Congress directed that existing grazing levels be maintained and permits renewed until the NEPA process was completed. In the Jarbidge case, the court overturned the intent of Congress by enjoining all grazing pending completion of the NEPA process. At the very minimum, the court should have permitted grazing to continue under the terms and conditions contained in the pre-existing permits until the agencies were able to complete the required NEPA documentation.

Additionally, NEPA, as it currently stands, prevents permittees from substantively intervening in litigation in which their grazing permits are in question. Currently in Idaho, permittees are facing two different court cases in which they have not been allowed meaningful intervening status. Even though Congressional findings of NEPA, and the other statutes, seem to protect the interests of livestock producers, permittees have only been allowed to intervene in the remedies portion of the case. Because their livelihoods are at stake, they should be allowed to intervene in the merits of the case as well. NEPA should be amended to make clear that permittees, contractors, or licensees should be able to participate and adequately

defend their interests in court. As illustrated in the examples above, the consequences of an agency failing to adequately conduct NEPA never wholly falls on the agency. Rather, it is the permittee who bears the brunt. Because of this, they should be enabled to fully engage in the courtroom when their permits are at risk.

An issue that could be key in preventing the devastating litigation would be in clarifying in code that the agency needs to be allowed to exercise its expertise on its own NEPA documents in its own administrative appeal process before an issue is taken to Federal Court. An exhaustion of administrative remedies must occur.

In conclusion, the Public Lands Council, the National Cattlemen's Beef Association, and the Idaho Cattle Association appreciate the important public policy goals served by the National Environmental Policy Act. We understand that environmental impacts of federal activities should be considered prior to undertaking the activities, and the public should be given the opportunity to participate in the process for considering the environmental impacts. However, in the years since NEPA has been enacted, it has been applied in a way that must be at odds with the intent of the original authors of the Act.

Since the mid-19th century, ranchers have depended on the vitality of America's rangelands for their survival, and as a result, ranchers have developed an innate love for the land and personal stake in its preservation. Environmental services provided by ranching operations include open spaces, wildlife habitat, clean air, clean water, and fire and weed control. Today's ranchers represent some of America's last living embodiments of true environmentalism. The American public and the ranching industry benefit tremendously from the continued economic vitality of the public land ranching industry.

As a rancher, I support this Task Force in its efforts to review and revise NEPA. I encourage you to move forward so that my family and countless ranching families across the West can continue our rich heritage for future generations.

Ms. MCMORRIS. Thank you very much. Mr. McGarity?

**STATEMENT OF THOMAS O. MCGARITY,
UNIVERSITY OF TEXAS SCHOOL OF LAW**

Mr. MCGARITY. Madam Chairman and members of the Task Force, I thank you for the opportunity to be here today. My name is Tom McGarity. I teach at the University of Texas School of Law. I am also President of the Center for Progressive Reform, which is a nonprofit research and educational organization dedicated to protecting health, safety and the environment through and commentary. CPR prepared a report on the Katrina levees. That report is available on our website and I have some copies here if people are interested, I can provide them for you.

CPR scholar Joe Feller of Arizona State University School of Law contributed to the portion of my testimony, my written testimony, which was devoted to grazing rights and Tom Lustig of the National Wildlife Federation is here to answer detailed questions, if you have detailed questions, about the grazing aspect of my testimony.

First, with all respect, having studied in considerable detail the history of the NEPA litigation and the actuality of the failure of the levees, NEPA did not cause these levees in New Orleans to fail. In the wake of Hurricane Betsy, there was a major project to protect New Orleans. There were two options, the High Level Option and the Barrier Option that we have heard described already. Both options, and let me be clear on this, both options were designed only to protect against a standard project hurricane, which was a hurricane that was simulated at that time that would have occurred ever 200 to 300 years and which, in modern terms, is roughly equivalent to a fast moving category three hurricane. So the Barrier Project would not have prevented the category four hurricane

from crossing over at least into Lake Pontchartrain, at least to some extent.

The Corps initially decided to implement the Barrier Option. That was enjoined in a lawsuit on December 30, 1977. The Corps could have responded to that injunction easily within a year, done the studies and gotten the Barrier Option back on track. But as they went back to the drawing board, and this is the history of the matter, they went back to the drawing board, they realized the Barrier Option, which was already in progress, was costing a whole lot more than they had anticipated. And the reason was they were having to condemn property because private landowners were opposed to it and were demanding, to protect their property rights, they were demanding a high amount of compensation for the land where they needed to build the levees.

The Corps ultimately decided to implement the High Level Plan with the existing levees, because it was considerably less expensive. The levees did not fail, or the Barrier Plan would not have protected anything in New Orleans east of the Industrial Canal. All of that flooding happened out of Lake Bourne, which is on the other side of what would have been the floodgates. The floodgates could have even exacerbated that flooding. But all that devastation, the project would not have prevented at all.

The devastation that did happen up the 17th Street and London Avenue Canals, it is now becoming very clear in light of the recent reports from the National Science Foundation, were caused by poor construction and design. Briefly, I would like to mention that NEPA has not, in my view, unduly interfered with proper issuance of BLM and Forest Service grazing permits as some critics have suggested. We need site specific analysis of the impacts of grazing or any other permitted activities on public lands. The example of the Comb Wash grazing allotment that I set out in my prepared testimony is a very good example of that. In the 35 years since the enactment of NEPA, only three cases have occurred in which livestock were ordered out of an area in connection with NEPA litigation. In all three cases, the agency not only failed to comply with NEPA, but there was also proof that the livestock grazing was causing serious damage. There has never been a case in which livestock have been removed solely because the agency failed to comply with NEPA.

By performing the critical function of policing agency compliance with NEPA's modest analytical requirements, private litigation is insuring that Federal agency decisionmaking continues to be sensitive to environmental concerns. This is what the American public expects and Congress should not undermine that expectation by amending this bulwark of environmental law. Thank you very much.

[The prepared statement of Mr. McGarity follows:]

Statement of Thomas O. McGarity, W. James Kronzer Chair in Trial and Appellate Advocacy, University of Texas School of Law, and President, Center for Progressive Reform

Madame Chairman, Ranking Member Udall, and Members of the Task Force, thank you for the opportunity to testify before you today. My name is Tom McGarity. I hold the W. James Kronzer Chair in Trial and Appellate Advocacy at the University of Texas School of Law. I have taught environmental law for more

than 27 years at the University of Kansas and the University of Texas. I have written law review articles on the National Environmental Policy Act (NEPA), and I have advised counsel in NEPA litigation. With my Co-Author John Bonine of the University of Oregon School of Law, I wrote one of the early casebooks on Environmental Law, and that casebook provided a comprehensive overview of all aspects of NEPA litigation.

I am also the President of the Center for Progressive Reform (CPR). Founded in 2002 as the Center for Progressive Regulation, CPR is a 501(c)(3) nonprofit research and educational organization dedicated to protecting health, safety, and the environment through analysis and commentary. CPR is comprised of university-affiliated academics with expertise in the legal, economic and scientific issues related to regulation of health, safety and the environment. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR further believes that people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation and improved public access to information.

Last September, CPR published a report on the New Orleans levees in the aftermath of Hurricane Katrina, entitled "Broken Levees: Why They Failed," that is available on the CPR website at: <http://www.progresivereform.org>. CPR Scholar Joe Feller of Arizona State University College of Law contributed the portion of this testimony devoted to grazing on public lands.

NEPA Litigation Plays a Critical Role in Protecting Our Shared Environment.

The very first law that President Nixon signed to initiate the "environmental decade" of the 1970s was the National Environmental Policy Act (NEPA), and that statute is frequently referred to as the "Magna Carta" of American Environmental Law. The primary vehicle through which NEPA attempts to accomplish its salutary purposes is its requirement that all federal agencies prepare environmental impact statements (EISs) for "proposals for legislation and other major federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). Because of NEPA's constitution-like language and breadth of vision, the meaning of these words only became apparent after several years of litigation gave them form and content. Once the Council on Environmental Quality promulgated comprehensive implementing regulations in 1978, NEPA's EIS requirement became part of most agencies' "standard operating procedures," and litigation was limited primarily to policing agency compliance with the regulations.

By the end of the 1980s, NEPA litigation had slowed down considerably, and scholars were asking whether compliance had become so routine that the statute had become a "dead issue." Paul G. Kent & John Pendergrass, *Has NEPA Become a Dead Issue?* Temple Env. L. & Tech. J. 11 (1986). This trend changed during the George W. Bush Administration as the rate of NEPA lawsuit filings rose from a historical average of 108 cases per year to 137 in 2001 and 150 in 2002. Jay E. Austin, et. al, *Judging NEPA: A "Hard Look" at Judicial Decision Making Under the National Environmental Policy Act* (Environmental Law Institute (2005). Even at this somewhat increased pace, however, it can hardly be said that NEPA litigation is overwhelming the federal resource agencies. Only about 0.2 percent of the federal actions generating NEPA environmental assessments result in litigation. Robert G. Dreher, *NEPA Under Siege* 15 (Georgetown Environmental Law & Policy Institute 2005).

The recent increase in NEPA filings is explained by the critical policing function that Congress meant for NEPA to perform. NEPA applies exclusively to "federal" actions undertaken by Executive Branch agencies, and it is wholly unrealistic to expect that the Executive Branch will ensure that its own agencies consistently comply with NEPA. The statute therefore envisions that private citizens who are adversely affected by federal agency actions will play a role in enforcing NEPA's modest EIS requirement. As in most areas of environmental law, including EPA regulation under the Clean Air Act and Clean Water Act, when federal agencies press the boundaries of allowable conduct under the law, private entities can be expected to challenge unlawful conduct in court. That is precisely what has happened during the last four years as the George W. Bush Administration has at many levels attempted to reduce the role that environmental considerations play in federal agency decisions.

Litigation is not cheap, and private entities and public interest groups generally employ it only as a last resort. Although the pace of NEPA litigation has increased

somewhat during the last four years, there is no evidence that any of this increased litigation is “frivolous” as some critics claim. According to an empirical study undertaken by the Environmental Law Institute, the overall success rate of NEPA plaintiffs in federal district court during this period was 44 percent, a rate that is “roughly consistent with long-term historical averages.” Jay E. Austin, et. al, *supra*, at 8. Likewise, the success rate in courts of appeals was 31.8 percent, which is also roughly consistent with the historical rate. *Id.*, at 9.

An effectively enforced NEPA provides a powerful vehicle for local citizens to become informed about and influence the outcome of decisions made by remote decision makers in Washington, D.C. For example, it appears that a large proportion of the successful NEPA claims in the Northwest during the past several years have involved claims by local groups against decisions by federal agencies that are in large part driven by policies made in Washington, D.C. In other words, NEPA litigation in the Northwest is not thwarting local desires, and it is in fact facilitating local demands for environmental protection against local federal decision makers who are taking their orders from policymakers in the Nation’s Capitol.

NEPA Litigation Did Not Cause the New Orleans Levees to Fail.

Soon after the damage to New Orleans became apparent after Hurricane Katrina, NEPA critics initiated a concerted campaign to blame the damage on NEPA litigation brought against the Corps of Engineers in 1976 challenging the adequacy of the environmental impact statement that the Corps had prepared for a proposed “barrier” project aimed at protecting Lake Pontchartrain from Hurricane storm surges. The historical record of the project and the litigation does not, however, support this radical contention.

The 1977 NEPA Litigation and Subsequent Developments

Because New Orleans is situated in the delta formed at the mouth of the Mississippi River, it has always maintained a flood control system in place to protect it from the risks of flooding from the river to the south, Lake Pontchartrain to the north and Lake Bourne and the Gulf of Mexico to the east. The city is protected from Lake Pontchartrain and Lake Bourne by an interconnected series of levees that extends along the lakes. Another series of levees provides protection to Eastern New Orleans and St. Bernard Parish, which are located to the north and east of New Orleans, from Lake Pontchartrain on the north and from Lake Bourne and the Gulf on the east.

Because New Orleans is below sea level and rapidly sinking, rainwater that flows into the city must be removed with huge pumps that force the water to move along three man-made canals, called “outfall canals,” to Lake Pontchartrain. The canals are lined with levees and concrete floodwalls that prevent the water from spilling into the city. In addition to the drainage canals, the Corps of Engineers constructed two large shipping canals through the city to permit ocean-going vessels to move from the Mississippi River through the city to Lake Pontchartrain or the Gulf of Mexico. The Industrial Canal slices north/south across the city between the river and the lake at the point where they are closest to each other. The Mississippi River-Gulf Outlet (MRGO) canal bisects the Industrial Canal and travels to the Gulf of Mexico.

In 1965, Congress authorized the Lake Pontchartrain and Vicinity Hurricane Protection Project (LPVHPP) to provide hurricane protection to the Greater New Orleans metropolitan area. To implement this statute, the Corps of Engineers studied two major options—the “high level” option and the “barrier” option. Under the “high level” option, the Corps would raising all of the existing levees to a height that would prevent flooding that could result from the “standard project hurricane,” a simulated hurricane that would hit New Orleans once every 200 to 300 years. This mythical hurricane was roughly equivalent to a fast moving category 3 storm on the Saffir-Simpson hurricane scale. In practice this would have resulted in raising the levees from between 9.3 and 13.5 feet above sea level to between 16 and 18.5 feet above sea level. United States General Accounting Office, Cost, Schedule, and Performance Problems of the Lake Pontchartrain and Vicinity, Louisiana, Hurricane Protection Project (PSAD-76-161 (August 31, 1976) [hereinafter cited as 1976 GAO Report], at 3.

Under the “barrier” option, the Corps would have constructed levees along the far eastern edge of Lake Pontchartrain where it flows into Lake Bourne and the Gulf of Mexico through two relatively narrow channels at the Rigolets and Chef Menteur Pass. The Corps would have constructed huge structures at the two passes that would have allowed water to flow back and forth between the lakes but could be closed as a hurricane approached. The Corps believed that the levees and the barrier structure would prevent the storm surge preceding a hurricane from crossing

from Lake Bourne into Lake Pontchartrain. Like the high level option, the barrier option was designed to protect against the standard project hurricane.

The Corps initially decided to implement the barrier option. Work on the barrier structures and levees running from New Orleans to the those structures, however, was greatly delayed because landowners opposed to the project demanded high prices for the property that the Corps needed for those levees, thereby forcing the Corps to exercise its power of eminent domain. 1976 GAO Report, *supra*, at 16.

In 1976, a coalition of local fishermen and an environmental group called Save Our Wetlands sued the Corps of Engineers alleging that the final environmental impact statement (FEIS) for the project was inadequate. On December 30, 1977, a federal judge issued an injunction preventing the Corps from conducting any work on the barrier project until it had prepared an adequate FEIS. The injunction was subsequently modified to permit continued construction of the levees between the lake and the City of New Orleans.

The lawsuit temporarily prevented the Corps from working on the barrier option, but the Corps abandoned this option for other reasons. When the injunction sent the Corps back to the drawing board, it reconsidered the costs and benefits of the barrier and high level options in light of the increased cost that it had been encountering because landowners were insisting on protecting their property rights. At the same time, the Corps was encountering strong opposition to the barrier plan from local citizens who did not want to pay a very high price for a project that might endanger the vitality of Lake Pontchartrain and from representatives of areas on the Lake Bourne side of the barrier who would have been at greater risk of flooding during hurricanes.

The intense public opposition was in evidence in congressional hearings conducted in New Orleans the week after the injunction issued. Hearings on Hurricane Protection Plan for Lake Pontchartrain and Vicinity before the Subcommittee on Water Resources of the House Committee on Public Works and Transportation, 95th Cong., 2d Sess. (1978) [hereinafter cited as 1978 House Hearings]. A spokesperson for the League of Women Voters argued that the Corps had never undertaken a study of the cost to taxpayers of maintaining the urbanization of wetlands that the project envisioned, and she noted that the voters of New Orleans had defeated proposals to participate in the financing of the barrier project on three separate occasions, but had voted to approve a similar project without the barriers the previous year. *Id.* at 11. An informal poll conducted by Representative Robert Livingston indicated that a substantial majority of the New Orleans citizens either opposed the project (38.5 percent) or favored discontinuation until the studies could be completed (23.6 percent). *Id.* at 12. A state legislator from St. Tammany Parish, part of which was on the Lake Bourne side of the barrier project, warned that the project would put his parish at risk when the gates were closed because it would deflect the surge from Lake Bourne into St. Tammany parish. *Id.* at 47-48.

By 1982, the New Orleans district of the Corps of Engineers had changed its mind. It now favored the high level plan "because it would cost less than the barrier plan" and "have fewer detrimental effects on Lake Pontchartrain's environment." United States General Accounting Office, *Improved Planning Needed by the Corps of Engineers to Resolve Environmental, Technical and Financial Issues on the Lake Pontchartrain Hurricane Protection Project* (GAO/MASAD-82-39) (August 17, 1982), at 2. The Corps did not make a final decision on how to proceed until 1985 when it decided to implement the high level plan because by then it was considerably less expensive. The high level plan of 1985 was substantially completed prior to Hurricane Katrina.

Why the Levees Failed

The water that flooded New Orleans did not flow over the high level levees situated between Lake Pontchartrain and the city. Instead, it appears that the surge flowed up the 17th Street and London Avenue canals and breached the floodwalls lining those canals. In addition, although the Corps enhanced the levees protecting Eastern New Orleans and St. Bernard Parish as part of the high level plan, these areas were not protected from the "end around" exposure that occurred during Hurricane Katrina. The hurricane surge entered Lake Bourne from the Gulf of Mexico and proceeded up the MRGO canal to the Industrial canal in the heart of New Orleans. The surge destroyed most of the levees and flood walls along the MRGO canal in St. Bernard parish as it pushed up the narrowing canal from Lake Bourne to the conjunction of the MRGO canal with the Industrial canal. The levees and floodwalls along these two "outlet" canals were probably breached by the storm surge traveling up the MRGO canal from the Gulf of Mexico. This storm surge would not have been prevented by the barrier project, and it may well have exacerbated that surge.

The Limited Impact of the 1977 NEPA Litigation

The lawsuit brought by local fishermen and a local environmental group was entirely justified, because the EIS filed by the Corps was clearly inadequate. The court found that "the picture of the project painted in the FEIS was not in fact a tested conclusion but a hope by the persons planning the project that it could in fact be constructed so as to meet the environmental objectives set out in the FEIS." *Save Our Wetlands v. Rush*, Civ. No. 75-3710, Slip Opinion (E.D. La. 1977). The court noted that the Corps' chief engineer for the New Orleans Division had requested further model studies because the draft EIS relied on studies that were undertaken more than a decade earlier for an obsolete version of the project. The chief engineer feared that the flow of water between the lakes, which was critical to maintaining the integrity of marine life in Lake Pontchartrain, was far less in the new version of the project than in the earlier version. The requested model studies were initiated, but they had not been completed when the FEIS came out, and the Corps continued to rely upon the obsolete studies. *Id.* at 5.

More importantly, the biological analysis undertaken in the FEIS relied entirely on a single telephone conversation with a single marine biologist who was asked to speculate on the impact of the project on marine organisms using the inter-lake flow rates predicted by the obsolete model. The Corps of Engineers official who was responsible for preparing the EIS expressed reservations about the statements on the effects of the structures on marine life in the lake, and he suggested that the conclusion that the project "would not" have a significant impact on lake biology should be changed to "should not." He was, however, overruled. The court further noted that the assessment of the benefits of the project included the benefits of further urban development on wetlands that would be reclaimed from the lake after the project was completed, but it failed to take into consideration the fact that the area had also been designated as a protected wetland. A Corps economist pointed this out and asked that the analysis be changed, but he was overruled. *Id.* at 6.

Finally, the court concluded that in light of "the problems of which the Corps was aware with respect to the possibility of significantly decreased tidal flow through the structures," the analysis of alternatives in the FEIS was inadequate. The court concluded that the FEIS "precludes both the public and the governmental parties from the opportunity to fairly and adequately analyze the benefits and detriments of the proposed plan and any alternatives to it." *Id.*

The court therefore enjoined further work on the barrier structures aspect of the project until the Corps had completed an adequate FEIS. It stated in no uncertain terms, however, that its opinion and order should "in no way be construed as precluding the Lake Pontchartrain project as proposed or reflecting on its advisability in any manner," and it stressed that "[u]pon proper compliance with the law with regard to the impact statement, this injunction will be dissolved and any hurricane plan thus properly presented will be allowed to proceed." *Id.* at 7.

Although some recent commentators have stated unequivocally that the court's injunction prevented the barrier project from going forward, the injunction should have delayed the barrier option only for as long as it took the Corps to remedy the problems that the court had identified in the EIS. The court would have lifted the injunction as soon as the Corps simply updated the EIS with adequate hydrologic modeling, conducted a more thorough biological assessment, and considered a few reasonable alternatives. In the process of responding to the EIS, however, the Corps reevaluated the "high level" alternative and decided to adopt that approach instead. The court did not force the Corps to adopt what by then had become the least expensive option because of the vigor with which local residents had asserted their property rights.

In any event, it is now becoming clear that Hurricane Katrina destroyed as much as 90 percent of the levees protecting St. Bernard parish south of the Industrial Canal and that the same surge probably caused the breaches in the floodwalls along the Industrial canal. The barrier plan that the Corps was considering at the time of the litigation would not have prevented the surge from moving from Lake Bourne over the levees and through the funnel of the MRGO canal into the heart of New Orleans, and it might well have exacerbated that surge.

Finally, academic engineers who have been studying the New Orleans levee breaches are coming to the conclusion that the reason that the floodwalls along the 17th Street and London Avenue outlet canals failed is that they were poorly designed and constructed. R. B. Seed, et al., Preliminary Report on the Performance of the New Orleans Levee Systems in Hurricane Katrina on August 29, 2005, November 2, 2005. It appears that at least some of the floodwalls were built on weak soils, were not adequately anchored and may have been designed without an adequate margin of safety. Ralph Vartabedian & Stephen Braun, System Failures Seen in Levees, *Los Angeles Times*, October 22, 2005. An engineer who has been working

on a National Science Foundation-funded study of the levee breaches has even suggested that malfeasance may have been involved as well. John Schwartz, "Malfeasance" Might Have Hurt Levees, Engineers Say, *New York Times*, November 3, 2005, at A22. The 1977 NEPA litigation obviously had nothing at all to do with the flawed design and construction of those floodwalls.

NEPA Has Not Unduly Interfered with the Proper Issuance of BLM and Forest Service Grazing Permits

The controversy that has recently arisen over NEPA requirements related to grazing on public lands has focused on the application of NEPA to the issuance and renewal of BLM and Forest Service grazing permits. Some NEPA critics have argued that NEPA's application to grazing permits is unnecessary or redundant and that NEPA litigation has forced ranchers off of their grazing allotments. This criticism has resulted in proposals to exempt grazing permits from NEPA altogether. A careful examination of the facts and the law, however, reveals that these criticisms are misdirected and that proposals for wholesale exemptions are entirely unjustified.

The Importance of Grazing Permits

The critical decisions that determine whether livestock grazing on public lands will be conducted in a responsible or a destructive manner are contained in the grazing permits issued by the Forest Service and the BLM. Each permit specifies—either in the permit itself or in an allotment management plan (AMP) incorporated in the permit—where, when, how many, for what length of time, what type, and under what terms and conditions livestock will graze. These specifications are not mere administrative details. The terms and conditions of grazing permits determine whether native plant communities will flourish or be replaced by invasive weeds, whether fish and wildlife habitat will be improved or degraded, and whether streams will run clear and cold or be turned warm and muddy. Furthermore, grazing permits affect large areas of land. The average grazing permit covers about 8,000 acres of public land, and the largest permits each cover several hundred thousand acres.

Other plans, programs, and decisions of the BLM and the Forest Service affect livestock grazing only insofar as they are implemented through the terms and conditions of these individual grazing permits. In particular, BLM and Forest Service land use plans should constrain grazing permits by specifying where grazing will be permitted, setting environmental standards that permits must meet, or providing guidelines to which permits should conform. However, most BLM and Forest land use plans are written in very broad and general terms, deferring specific determinations about locations and levels of livestock grazing to subsequent decisions on individual permits. Moreover, even where land use plans contain more specific decisions about grazing, these decisions are not effective on the ground unless and until they are incorporated in the terms and conditions of individual grazing permits, and they sometimes are omitted.

The Need for Site-Specific Information

Sound decision making about the terms and conditions of a grazing permit requires site-specific information about the lands covered and the resources affected by the permit. General guidelines and prescriptions cannot be applied to individual grazing allotments as boilerplate in a cookie-cutter fashion. The acceptable level, locations, and timing of grazing on a particular allotment depend on many site-specific factors including climate, elevation and topography, the types and conditions of soils and vegetation on the allotment, the history of grazing on the allotment, the numbers and locations of water sources, the types of fish and wildlife on the allotment and their habitat needs, the location and condition of streams and associated riparian areas, and other resources and uses of the allotment (such as archaeological sites or recreation) that may be affected by livestock grazing.

The critical role of grazing permits in determining the environmental impacts of grazing on the public lands, and the need for site-specific information in making decisions about those permits, was recognized by the court in *Natural Resources Defense Council (NRDC) v. Morton*, which held that a national programmatic environmental impact statement (EIS) did not provide the information needed for decisions about individual permits. *NRDC v. Morton*, 388 F. Supp. 829, 838-39 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied* 427 U.S. 913 (1976). The court ordered the BLM to prepare EISs "which discuss in detail the environmental effects of the proposed livestock grazing, and alternatives thereto, in specific areas of the public lands." *Id.* at 841. It did not, however, order the BLM to prepare a full-fledged EIS for each grazing permit, leaving that to BLM's reasoned discretion. *Id.*

The Inadequacy of Broad-Scale EISs that Are Not Site-Specific

After the court's decision in *Morton*, the BLM prepared approximately 150 EISs. The average EIS covered over 1 million acres of land and included over 100 different grazing allotments. Most of these EISs were prepared in connection with land use plans and purported to address the environmental impacts of all public land uses, not just grazing. The Forest Service, under the mandate of the National Forest Management Act, also prepared EISs in connection with its land use plans. These EISs, like those of the BLM, each typically cover an area of a million acres or more, including scores of grazing allotments.

Because these BLM and Forest Service EISs cover such large areas and include so many grazing allotments, they generally do not contain detailed, site-specific information about individual grazing allotments. In substance, if not in form, these area-wide EISs resemble the national, programmatic EIS that the court found inadequate in *NRDC v. Morton*. Subsequently, another court, in *NRDC v. Hodel*, 624 F. Supp. 1045 (D. Nev. 1985), found that such a broad-scale, generalized EIS is adequate to support a land use plan, where the land use plan itself is a broad, programmatic document that does not make specific decisions about grazing management on individual grazing allotments. However, these broad-scale EISs do not provide the information necessary to support decisions about individual grazing permits.

The severe lack of information in the broad-scale EISs prepared in connection with land use plans was starkly revealed in an administrative appeal, *National Wildlife Federation v. BLM*, which concerned the BLM's Comb Wash grazing allotment in Utah. The allotment includes five canyons that contain world-famous scenery, fragile riparian wildlife habitat, and thousands of archaeological sites. Under a BLM permit, these canyons were also grazed by cattle, even though they contained only a very small amount of forage—about 10% of the allotment's total. Testimony at the hearing in the case documented that, in the narrow, confined space of the canyons, the cattle were destroying riparian vegetation, causing severe soil erosion, trampling archaeological sites, polluting the streams, and covering campsites with manure and urine.

The Interior Board of Land Appeals (IBLA) found that the BLM's EIS, prepared in connection with a land use plan covering 1.8 million acres and including over seventy grazing allotments, had no information at all about the resources in the five canyons or the impacts of grazing on those resources. The board ordered the BLM to discontinue grazing in the canyons, while allowing grazing to continue on the remaining 90% of the Comb Wash allotment, until an adequate EIS was prepared. In response to the IBLA's decision, the BLM prepared an environmental assessment (EA), in which the BLM itself concluded that grazing in the canyons made no sense given the small amount of forage there and the severe damage that grazing was causing.

The Comb Wash case determined, in accordance with the holding of *NRDC v. Morton*, that a BLM decision to issue or renew a grazing permit requires a NEPA document (EA or EIS) with sufficient site-specific information to support a reasoned and informed decision about grazing on the allotment involved. The case did not hold that one EIS is required for each permit. The required information may be incorporated (though it usually is not) in an EIS prepared in connection with a land use plan. Alternatively, an EIS may be prepared for a group of grazing allotments. If the environmental impacts of grazing on a particular allotment are not significant, then an environmental assessment (EA) will suffice. Finally, once the impacts of grazing on a particular allotment are adequately analyzed, absent material changes in circumstances, the analysis need not be repeated each time the permit is renewed.

The Impact of NEPA Litigation

Although NEPA was enacted in 1969, the BLM and the Forest Service did not begin performing site-specific environmental analyses (EAs or EISs) on their grazing allotments until the 1990s. There are still thousands of grazing allotments on which such analyses have never been done. For this reason, assertions that NEPA analyses in connection with permit renewals are somehow "redundant" or "repetitive" are misinformed.

Despite the lack of NEPA compliance with respect to many allotments, grazing continues on more than 99.9 percent of those allotments. Although litigation, and the threat of litigation, played a role in prompting the BLM and the Forest Service to begin performing the badly-needed environmental analyses, litigation has not stopped grazing from continuing pending completion of those analyses.

Some critics of NEPA have invoked the specter of hundreds or thousands of ranchers being kicked off of their grazing allotments because of litigation over the

BLM's or the Forest Service's failure to comply with NEPA, but this hypothetical horror story has no basis in fact. In the thirty-five years since the enactment of NEPA, there have to my knowledge been only three cases in which livestock were ordered out of an area in connection with NEPA litigation. In all three cases, the agency not only failed to comply with NEPA, but there was also proof that livestock grazing was causing very serious damage to valuable natural resources. There has never been a case in which livestock have been removed solely because of the agency's failure to comply with NEPA. Moreover, of the three cases, in one cattle were ordered removed from only 10% of the grazing allotment in question, and in another a settlement was reached between the plaintiffs and the rancher that allowed cattle to remain on the land despite the court's order. Thus, there has been only one case in which an entire grazing allotment was shut down, even temporarily, on NEPA grounds, and in that case the plaintiffs offered the affected rancher an alternative area to graze his cattle.

The following are the specifics of the three cases:

1. *National Wildlife Federation v. BLM*, 140 IBLA 85 (1997). This is the Comb Wash case, in southeastern Utah, discussed above. After finding serious ongoing damage to soils, vegetation, riparian areas, water quality, wildlife habitat, and recreational sites, an administrative law judge ordered cattle temporarily kept off of 10% of one grazing allotment, while allowing grazing to continue on the remaining 90%. Later, the BLM, of its own accord, decided that grazing in the sensitive area affected by the judge's decision made no sense.
2. *Greater Yellowstone Coalition v. Bosworth*, 209 F. Supp.2d 156 (D.D.C. 2002). This case concerned the Horse Butte Allotment on the Gallatin National Forest in Montana, adjacent to Yellowstone National Park. Bison from the park were being shot as they entered the allotment in order to avoid the possibility that they might transmit brucellosis to the 147 cattle that grazed there. The Forest Service had committed to complete a NEPA analysis by 1998 to address the impacts of grazing on the allotment, including the killing of bison. As of 2002, the NEPA analysis had still not been completed. In order to prevent further killing of bison, the court enjoined grazing on the allotment for one season, pending the completion of the analysis.
3. *Western Watersheds Project v. Bennett*, Civ. No. 04-0181-S-BLW (D. Idaho 2005). This case concerned grazing on the BLM's Jarbidge Resource Area in Nevada. The court found that not only had the BLM failed to comply with NEPA, but also that grazing in the area was causing violations of the BLM's Standards for Rangeland Health, was violating standards in the applicable land use plan, and had contributed to an 85% decline in the population of sage grouse. The court enjoined grazing on 28 allotments covering 800,000 acres. After the court entered its order, and before any livestock were removed, the plaintiffs and the affected ranchers reached a settlement that allowed grazing to continue on the allotments.

Congressional Action

Even though agency failures to comply with NEPA have led to removal of cattle in only a couple of cases, many ranchers nonetheless feared that their operations could be threatened by litigation. To address this concern, Congress has since 2000 included riders in annual appropriations legislation specifying that, when a grazing permit expires before the agency completes its processing of a new permit in compliance with NEPA and other applicable laws, a new permit shall be issued with the same terms and conditions as the expiring permit. The 2003 appropriations rider extended the effect of this provision through 2008. Hence, any claim that NEPA has delayed grazing permit renewals cannot be based on fact.

Pending Amendments to the BLM's Grazing Regulations

Amendments to the BLM's grazing regulations that were proposed in 2003 and are expected to be promulgated in 2006 would delete the specific requirements in the current regulations for consultation with concerned citizens when the BLM issues, modifies, or renews a grazing permit. The justification given for the proposed deletion of these requirements is that they are redundant with the requirements of NEPA, which guarantees public participation in the issuance, modification, and renewal of grazing permits. Any legislation that would exempt grazing permits from NEPA would therefore directly contradict the rationale for these regulatory changes, and it would have the effect of completely excluding the public from critical grazing management decisions.

Conclusions.

It is clear beyond cavil that the 1977 Save Our Wetlands lawsuit did not cause the levees in New Orleans to fail during Hurricane Katrina. The Task Force should

therefore refuse to lend any credence at all to those who would invoke the suffering of the citizens of New Orleans to advance their own unrelated agendas with this wholly discredited myth. Similarly, contrary to the expressed fears of the livestock industry, NEPA litigation has very rarely forced a cessation of livestock grazing on public lands. Existing legislation provides for renewal of grazing permits pending NEPA compliance. Legislation exempting grazing permits from NEPA is therefore unnecessary, and it would in fact be detrimental to the desirable goal of public participation in critical grazing management decisions.

NEPA has "unquestionably improved the quality of federal agency decision-making in terms of its sensitivity to environmental concerns." Dreher, *supra*, at 4. By performing the critical function of policing agency compliance with the NEPA's modest analytical requirements, private litigation is ensuring that federal agency decision making continues to be sensitive to environmental concerns. That is what the American public expects and Congress should not undermine that expectation by amending this bulwark of American environmental law.

Ms. MCMORRIS. Thank you, Ms. Cowan?

**STATEMENT OF CAREN COWAN,
NEW MEXICO CATTLE GROWERS' ASSOCIATION**

Ms. COWAN. Madam Chairman, members of the Task Force and members of the Committee, thank you so very much for holding this hearing and allowing me the opportunity to testify today. My name is Caren Cowan and I am here today representing the New Mexico Cattle Growers' Association with members in all 33 of our state's counties, as well as 14 other states.

Having grown up on a ranch in southeastern Arizona and most of my family vacations being attending cattle growers' conventions, I thought I knew what my job was when I went to work for the New Mexico Cattle Growers' eight years ago. That was producer education, range betterment, living in states where there is a lot of Federal land, working cooperatively with those agencies. Within two weeks of cleaning out the old desk and starting in new, I learned that there was a lawsuit that had been filed and a potential injunction that could remove literally hundreds of ranching families in Arizona and New Mexico. The shape of my job has been changed ever since and I spend a great deal of my time working on litigation, rather than on the cooperation and producer education and range betterment that we ought to be doing and historically organizations like mine have done.

It is my understanding that NEPA is intended to analyze actions and look at potential consequences and mitigate those that are negative. It was never intended to promote litigation. If it was, Congress would have put in a citizen's lawsuit provision like it did in other laws like the Endangered Species Act and the Clean Water Act. However, we find that literally hundreds and hundreds of lawsuits are filed every year. In my testimony, it details a lot of statistics that I will not bore you with here at this point, but there are just numerous lawsuits. They are not filed by local people, they are filed by national organizations that are trying to change the landscape of the land.

In the spirit of full disclosure, I will tell you that the New Mexico Cattle Growers' has engaged in that litigation, as well. Our leadership determined that if the battlefield was going to be the court, then it was our responsibility to go to the courts to protect our members. But with that said, we have been in existence for over

90 years. We have been involved in probably a dozen lawsuits and only one of them had a NEPA connection.

As I said, my testimony goes into great detail on cases. But one of the things that we learned in looking at this is that there are a lot of cases that are settled and the agencies are finding that it is quicker and faster and cheaper to settle cases. And in that settlement, they are paying huge fees and costs to environmental organizations and the folks who sue on their behalf. If you wanted to find out all of this stuff, it would require going into each Court and pulling out documents and that sort of thing. But it is really not necessary to do that to learn the goals of what these folks have in mind who are trying to drive grazing and other natural resources off the land with the use of NEPA.

Last year I had the dubious honor of attending the National Public Lands Grazing Campaign event, which was held in Albuquerque on a panel about the buy out, the Federal taxpayer funded buy out that is being proposed.

At the end of my presentation, I kept getting asked the same questions over and over again and I kept giving the same answer, because it had not changed. Finally, the panel moderator said, well, what they really want to know is what we have to do to get you to agree with us so that we can take you off the land. Do we have to keep suing you? And of course my answer was sort of a laughing yes, go for it, because we are not leaving. And John Horning was at the back of the room and he hollered, well, Caren, we are ready to do it.

So that tells you what the meaning is here. The Forest Guardians in a story in "The Wall Street Journal" a couple of years ago, the story says, "First they track down ranchers who have permits to feed livestock on Federal land. The next step is to sue, accusing the government of mismanaging the land where cows graze. If the Guardians win in Court or if the government settles, the number of cows ranchers are allowed to graze is reduced."

Even when a suit is not filed, the fear of the Federal agencies of suits automatically going in and cutting numbers to try and avoid suits is prevalent. We have lots of producers in our state who have had their numbers reduced through NEPA by an agency who is trying to avoid a lawsuit. And I think if you talk to Federal land management agencies, they are going to tell you how much time they are using to try to make NEPA bullet proof and suit proof.

Part of what we found interesting as we did our research is who is actually doing the suing. There are colleges who are giving college credit to students who prepare environmental briefs and the colleges are being paid for doing those sorts of things. As we go to that, we talk about cost. The GAO has recently issued a report about how expensive the grazing program is. How much of that cost is involved in NEPA compliance and why is that money not going on the ground? We are wasting an incredible amount of time and money and human resources on litigation when we could be enhancing the environment. And I think that is what we all want, is a healthy environment, rather than lining the pockets of lawyers. I appreciate the time to be here. There are a lot of details in my testimony and I will stand for questions. Thank you.

[The prepared statement of Ms. Cowan follows:]

**Statement of Caren Cowan, on behalf of the
New Mexico Cattle Growers' Association**

Madam Chairwoman, members of the Task Force and Committee, and especially New Mexico's Congressman Tom Udall, Ranking Member, and Congressman Steve Pearce, on behalf of the membership of the New Mexico Cattle Growers' Association (NMCGA), thank you for holding a hearing on this most vital portion of the National Environmental Policy Act (NEPA) debate, and for the opportunity to testify before you.

My name is Caren Cowan and I am executive director of the NMCGA, an organization with members in all 33 of New Mexico's counties and 14 other states. Growing up on a commercial beef cattle operation in southeastern Arizona, where family vacations consisted of trips to the Cattle Growers' conventions, I thought I knew what I was getting into when I accepted this position with the NMCGA. Organizations like NMCGA have, for well over a century, looked after the interests of ranchers who care for the land and its creatures and have handed down family operations from generation to generation.

For many decades that meant working on producer education and range betterment, mixed in with public policy and making sure there was a regulatory climate conducive to sound land management. For organizations in the West where much of the land is held in state or federal hands, that also meant a healthy dose of cooperation with state and federal land and wildlife management agencies. These trade organizations also provided the social component so necessary for an industry where much of the work is solitary with families who live in isolation, many miles from the highway. There was always a buddy at a meeting that was suffering the same whims of Mother Nature and a cyclical market.

Imagine my surprise, when being on the job for about two (2) weeks in July of 1998, word came down that there was a very real possibility that literally hundreds of families in New Mexico and Arizona were in jeopardy of losing their livelihoods and their homes due to an environmental lawsuit. My job description changed rather radically that day and since then I find that instead of helping producers do a better job on the ground and working with other groups and agencies with the same goal, I spend a good portion of my time working through the court system just to keep ranchers on the ground. I know that federal land and wildlife management agencies are in the much the same shape.

It is my understanding that NEPA was and is intended to cause federal agencies to take a step back and look at the potential consequences on the environment of their contemplated "major federal actions," to involve the public in decision making and to mitigate potential consequences of actions. I do not believe that NEPA was ever intended to halt natural resource use, sometimes to the detriment of natural resources, or to deprive families and rural economies of livelihoods.

NEPA is not about actions that are taken, but is pre-action analysis. Litigation on NEPA is on procedure not environmental impacts. Additionally, NEPA does not contain a "citizen's lawsuit provision" as do other federal environmental laws. Given that Congress made their intent clear with these provisions in other laws, it seems to me that it was never Congress's intent that NEPA would be fodder for the endless litigation we are now facing.

However, today's interpretation by the courts and regulatory regime have made NEPA one of two primary federal environmental laws that are the vehicles for environmental elitists to stop use of federal lands, causing great harm and destruction along the way. A whole cottage industry of so-called environmental groups has sprung up using the courts for the admitted purpose of eliminating land use.

In the grazing industry, there is a "zero-grazing movement, which aims to clear every head of cattle off the 265 million acres of wildlands the U.S. government owns in 11 Western states," according a November 2002 article in the Wall Street Journal (Attachment A). In New Mexico, as in many other areas, these groups have already all but eliminated the timber industry.

Yet logging still provides fodder for NEPA litigation. Many suits are filed on the environmental analysis of post-fire salvage logging. There is a short "shelf-life" for scorched timber before insect infestation sets in. Even a slight delay in projects can render the timber useless, so it is quite easy for a NEPA lawsuit to eliminate a project whether or not the environmental group plaintiffs prevail.

Far from the intent of NEPA, the groups relying on litigation to mold the landscape to their selfish views are regional and national in scope. Here are some statistics on lawsuits filed by so-called environmental groups based on research on Public Access to Court Electronic Records (PACER) system (this does not include cases filed in New Mexico because the state does not use PACER):

- Center for Biological Diversity, which originated in New Mexico and now has its main office in Arizona, has only been in existence for 15 years, and since that time has filed a total of 414 cases
- Forest Guardians, which originates in New Mexico, has been in existence 14 years and has filed a total of 58 cases
- Oregon Natural Desert Association, from Oregon, has been in existence 18 years and has filed a total of 40 cases
- Western Watersheds Project, from Idaho, has been in existence 12 years and has filed a total of 44 cases

Even some of the longstanding organizations have refitted their purposes to litigation as well.

- Defenders of Wildlife has been in existence 58 years and has filed a total of 163 cases
- National Wildlife Federation has been in existence 69 years and has filed a total of 191 cases
- Sierra Club has been in existence 107 years and has filed a total of 739 cases

In the spirit of full disclosure, NMCGA and other organizations in New Mexico and throughout the West have gotten in the litigation game as well, not because our industry is litigious by nature, but because that is where the game is being played. However, although the NMCGA has been in existence nearly a century, we have only intervened in a few cases and have filed a few cases under the ESA, only one of which had a NEPA component. This would amount to a total of less than a dozen cases in over 90 years.

Admittedly, this huge number of cases filed by the environmental groups listed above does not relate only to NEPA. The Endangered Species Act (ESA) and the Clean Water Act (CWA), as well as land management statutes and the Freedom of Information Act (FOIA) all play into the strategy of litigation by those who would drive all use from the land just for preservation's sake.

Just cursory computer search turn up some fairly startling data regarding the use of NEPA. A search of WESTLAW, a commercial data service that provides data bases for all published federal court decisions as well as a few arbitrarily selected non-published federal decisions for all federal courts, revealed that from January, 2000 to the end of last month, a total of 999 cases were decided containing the acronym NEPA or the phrase "National Environmental Policy Act." A search using the word "environmental" as the filter netted 3,902 cases, meaning that NEPA made up more than 25 percent of all environmental litigation.

A detailed evaluation of every environmental case filed in the Oregon Federal District Court for a four (4) year period gives a glimpse of the magnitude of the issue. According to PACER there were a total of 148 "environmental" cases filed from 2002 through October 28, 2005. Electronic documents were not available for eight (8) of those cases. Of the 140 remaining cases, only 28 were not filed by "environmental" organizations, meaning that 80 percent of the "environmental" cases were filed by "environmentalists." Some 63 cases or 53 percent of "environmentalist environmental" cases included at least one NEPA claim. The balance of the cases included 39 that were primarily ESA claims, with the remaining 10 involving a variety of statutes. Clearly, NEPA appeared to be the vehicle of choice for litigation. Logging was the focus of 78 percent of the NEPA suits with 49 suits, with grazing and recreation or access coming in with five a piece. Hunting was target of another three cases, while mining drew one claim.

To get the entire picture of the frequency and impact of NEPA claims, one must physically pull the dockets and pleadings for every environmental case filed in every district court in the nation. However, that human labor is not necessary because these "environmental" groups are quite vocal about their aims and means of achievement. I had the dubious honor to be invited to participate on a panel at the annual meeting of the National Public Lands Grazing Campaign regarding a taxpayer funded buyout of federal lands ranching last year. During the question and answer period of the presentation, I was repeatedly asked how NMCGA formulated policy and what the general membership thought about the potential of a buyout of livestock grazing preference rights on federal lands. The answer was the same, our members determine policy and they have determined not to support a taxpayer funded buyout.

Eventually panel moderator Andy Kerr said that what the people assembled really wanted to know was just what kind of pressure was it going to take for ranchers to accept the buyout proposal. Were the groups involved just going to have to keep suing? My answer was, of course, yes. John Horning, Forest Guardians executive director, shouted from the back of the room that he was happy to oblige.

The Forest Guardians, as reported in the Wall Street Journal, describes itself as "relentless" and "uncompromising." "First they track down ranchers who have

permits to feed their livestock on federal land...,” the story says. “The next step is to sue”, accusing the government of mismanaging the land where the ranchers’ cows graze. If the Guardians win in court, or if the government settles, the number of cows a rancher is allowed to graze with his permit is cut....”

These statements raise another issue, that of the “settling” of cases by government agencies to avoid further litigation. In the Oregon court research, there were 63 NEPA cases in the past three years, 32 of which have been resolved. In 11 of the resolved cases, the environmental organization lost.

In 21 cases the organization won at least part of its case. Of those 21 cases, 13 were “settled” by the federal agency prior to the court issuing a ruling. Thus, the environmental organizations proved their case in only eight (8) cases. However, when the environmental groups prevail, at least in part, or settle, their legal costs and fees are paid by the federal government. Again, determining the total amount of those payments is difficult without physically going to each federal district court and pulling individual documents. But preliminary research indicates that since the attorney fees paid by federal agencies are generally less when cases are settled rather than litigated, federal agencies may be settling cases to reduce financial exposure rather than vigorously defending themselves at risk of a loss in court. Additionally, according to numerous published federal court decisions, attorney hourly fees for individual attorneys with between 10 and 20 years of experience range between \$200 per hour and \$350 per hour. For example in a recent request for attorneys fees filed by the National Wildlife Federation (in a case that is NOT completed) the attorneys requested \$1,054,055.65 in fees, with the lead attorney requesting \$325 per hour. In that case, the NWF is even charging law clerks at \$100 per hour.

This is also a bone of contention for NMCGA. Environmentalists sue the government so the government must defend itself with tax payer dollars. Groups like NMCGA often must hire lawyers to protect the industry, then the government pays for the environmentalists’ lawyers—we get to pay THREE TIMES.

But, perhaps the most interesting aspect of this debate is “who” is bringing the litigation and the attorneys employed. A substantial amount of litigation in the Northwest is done by the Lewis and Clark College of Law’s Pacific Environmental Advocacy Center (PEAC). PEAC grants college credit to law students who assist with briefing and litigation for a client list such as Oregon Natural Desert Association, Forest Guardians, National Wildlife Federation, Great Lakes United, Audubon Society and other environmental organizations. Although PEAC is supported by the Lewis and Clark Law School, including payment of professors who write briefs and participate in, PEAC requests and is granted attorney fees and costs. For more information, see <http://law.lclark.edu.org/peac>. The Law School at the University of Denver has the same type of program called the Environmental Law Clinic. According to its website, the clinic assumed the environmental responsibilities from Earthjustice and is now run by attorneys associated with the Center for Biological Diversity. See <http://law.du.edu/naturalresources/clinic>

Even more disturbing is the fact that while land and wildlife management agencies and land users are devoting resources, manpower and funding, to NEPA compliance and litigation, fewer and fewer resources are available to enhance the land. According to the Bureau of Land Management (BLM) in Utah, for every hour that the BLM spends writing a single grazing environmental assessment (EA), once litigation is filed, BLM staff spends 3 to 4 hours defending it in litigation. The Utah BLM also reports that only three EAs, which also included substantial livestock reductions, have NOT been appealed out of over 40 EAs covering the grazing allotments in Utah alone. Once an EA is appealed to the Office of Hearing and Appeals, it takes an average of five over years to get a final decision, just from the administrative law judge. It would be interesting to compare the time that the agency is spending on preparing for litigation versus what is spent on on-the-ground land management. According to the Utah BLM, the Nevada and Idaho BLM offices suffer the same problems. According to this BLM official, the BLM grazing program is “paralyzed” in litigation. Based upon this amount of litigation, the BLM will not be able to complete all grazing term permit renewals by 2009 as directed by Congress.

The Government Accounting Office (GAO) recently issued a report on how costly grazing on federal lands is to tax payers. My question is how much of that cost is in land management versus regulatory compliance and litigation? On the other hand, what is the value of the land and wildlife stewardship the livestock industry provides?

NMCGA receives numerous NEPA documents on grazing allotments representing untold man hours of labor in creation. Grazing is an “action” that has been ongoing in the West for literally hundreds of years. It is hardly a “major federal action.” But some of the documents we have received lately defy reason. They are on renewal

of grazing of a dozen or less animals. Where is the line drawn for a "major federal action?"

In conclusion, NMCGA believes that there must be revision of NEPA to relieve the burden imposed by litigation or the threat of litigation. That revision should include:

- Using the NEPA process as Congress intended, not as a vehicle to justify decisions that have already been made, nor as fodder for endless lawsuits
- Ongoing activities, like livestock grazing, that have been going on for hundreds of years should fall under a categorical exclusion. If uses, such as grazing, are to be analyzed that should be on the overarching use of the land, not micro managing items like seasons of use, grazing methods, and animal numbers. There is extensive NEPA analysis at the forest management level, which includes grazing. Why is there additional NEPA necessary?

Thank you for your time and attention. If you have questions, I'd be happy to try and answer them.

NOTE: A copyrighted article submitted for the record by Ms. Cowan has been retained in the Committee's official files.

**Response to questions submitted for the record by Caren Cowan,
Executive Director, New Mexico Cattle Growers' Association**

1. Professor McGarity says in his testimony that the notion of ranchers getting removed from federal lands is a "hypothetical horror." Can you comment?

Professor McGarity is simply incorrect in his beliefs. As New Mexico Cattle Growers' Association (NMCGA) member Marinel Poppie testified before the Task Force in June 2005, the impacts on ranchers are real and devastating. Dr. Poppie's full testimony with its voluminous attachments is part of the record of the June 18, 2005 hearing in Show Low, Arizona. However, this portion provides the answer to the question:

Unfortunately I don't think my NEPA horror story is that different from most of my neighbors or other allotment owners throughout Region 3. On October 27, 2001, I was issued a term grazing permit for 396 cows and eight horses. The permit was to be effective until February 28, 2011 per the terms and conditions of the permit. Little did I know at the time the region was entering into a severe drought. In 2002, due to that drought, I took a temporary and voluntary reduction in my number to approximately 300 cows and eight horses. I have obtained the bills for the actual number of cattle run on the Roberts Park Allotment for the 16 years previous to my purchase. That averaged 379 head per year. (See attachment A)

One of the statements made by the range staff officer over my allotment was that adequate livestock water is the key to prevention of overgrazing. He further stated my allotment was 100 percent watered.

In June of 2003 I learned that the USFS had begun NEPA analysis on my allotment and had provided scoping documentation to the public without ever involving me in any of the process. The USFS was proposing to cut my allotment by 50 percent. Can you imagine what cutting your pay check by 50 percent would do to you and your family?

When I was informed of the proposed action, I received no justification for such drastic action. When I requested that justification, all I was provided was a few old data sheets with no dates or signatures. There was no recent monitoring data or even historic trend data available on which to base a decision.

For the past two years I have hired my own range management consultant to provide scientific data on the condition of my allotment. His data indicates that there is ample forage not only for my permitted numbers, but additional livestock (attachment B).

My allotment has 43 stock tanks that were not disclosed to the public, as well as three drinkers and two water storage tanks. I have been diligent in continuing to improve watering facilities on the allotment. I have repaired two major watering systems that have opened vast areas of rangeland that had not been grazed for years. I have and will continue to improve the allotment and have worked toward a good working relationship with the USFS. In 2003 I was asked to list improvements I planned for the future. It was a three-page typed list, yet even after I completed some of the projects on the list, I was told that no matter how much I improved the rangeland, my allotment would be cut by 50 percent or more. It certainly appeared to be a predetermined decision and not something that could or would change through any public process.

Equally as egregious is the fact the USFS planted the seed with the public that my allotment should be cut and provided them incorrect information about the allotment, so that there would be public support for their proposed cut.

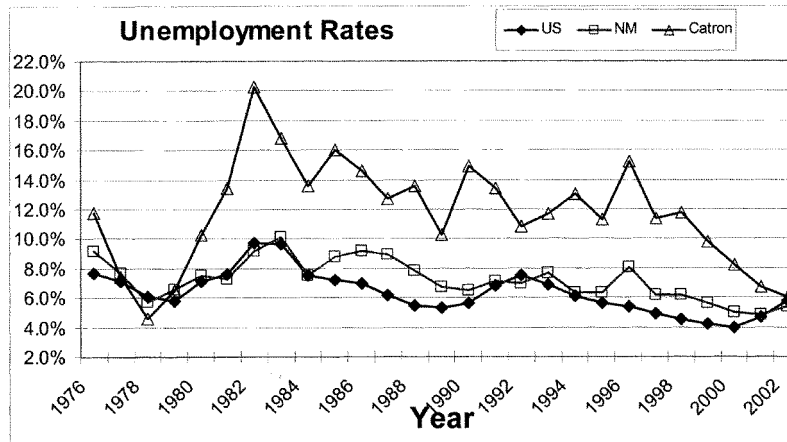
During the balance of 2003 and into 2004 there were some staff changes at the ground level in my district. The working relationship with the USFS improved and there was support to provide some management flexibility for my operation based on actual range condition.

Then the next bomb hit. On August 19, 2004, the USFS issued an "executive summary" of the NEPA required environmental assessment (EA) of my Roberts Park Allotment. Generally, EAs are 10 to 15 page documents, while environmental impact statements (EISs) are more full blown in-depth analysis that can run in the hundreds of pages.

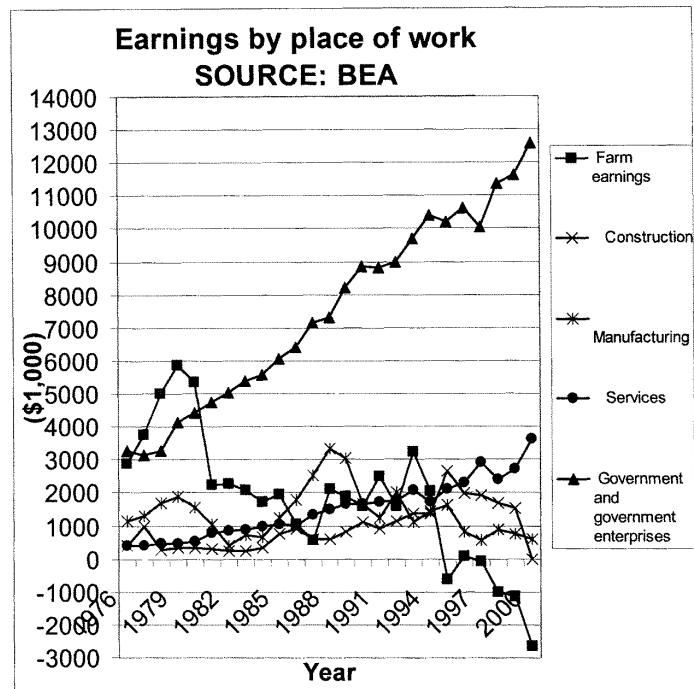
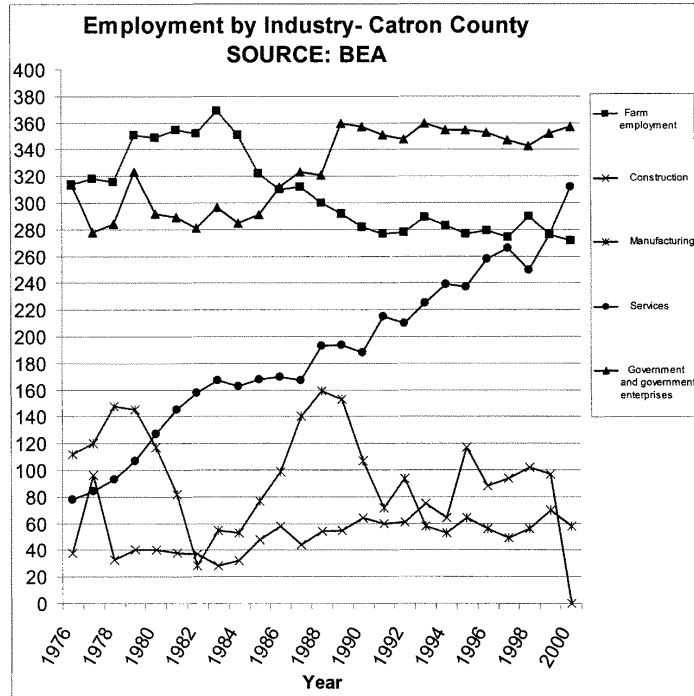
Imagine my surprise when I received a 35 page document (attachment C) with the USFS's "proposed" alternative to cut my permit to 240 head of livestock, with 40 head of those suspended for five (5) years. Although I had worked to craft an alternative of my own that would allow me to stay in business, it was completely ignored at the supervisor's office level. Additionally, the document was biased to the "preferred alternative" and grazing is maligned throughout.

Adding insult to injury is the fact that the document did not even provide a firm comment deadline. Many of these documents now days only tell those who wish to participate in the process that they have 30 days from the date the notice of the document appears in the local paper closest to the allotment or forest supervisor's office. And, when you call the office, they won't tell when it appeared in the paper. This makes participation by groups like the New Mexico Cattle Growers' Association and others difficult because they don't get the local paper for every forest allotment in the state. (testimony attached)

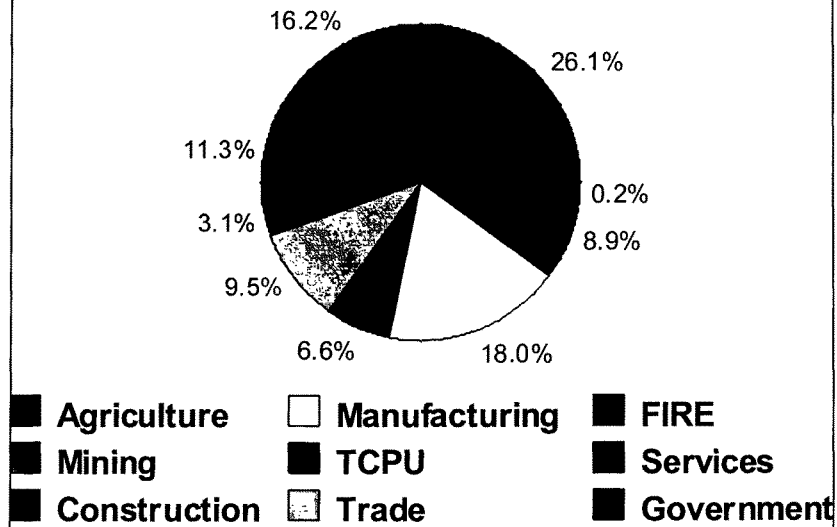
Additionally one only has to look at statistics from Catron County, New Mexico, commencing in 1994 when NEPA application began by the U.S. Forest Service, followed soon after by litigation involving several federal environmental laws. Grazing animal unit months (AUMs) fell by more than 200,000. (document attached)



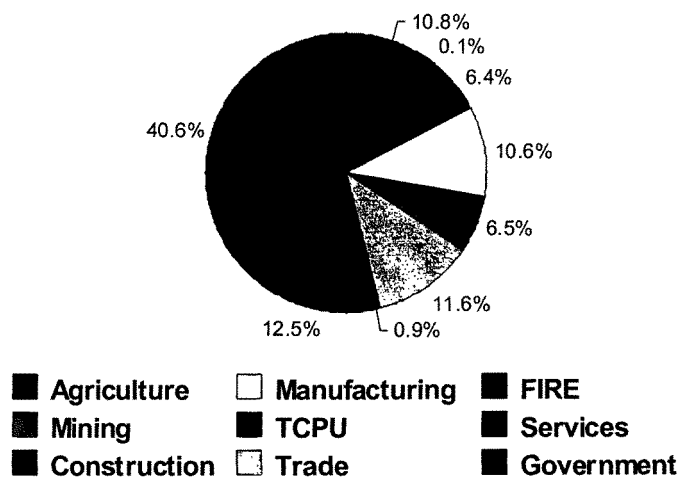
SOURCE: New Mexico Department of Labor

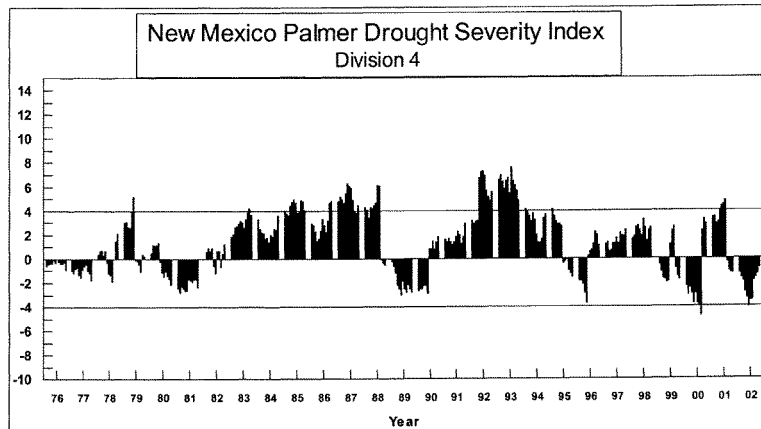
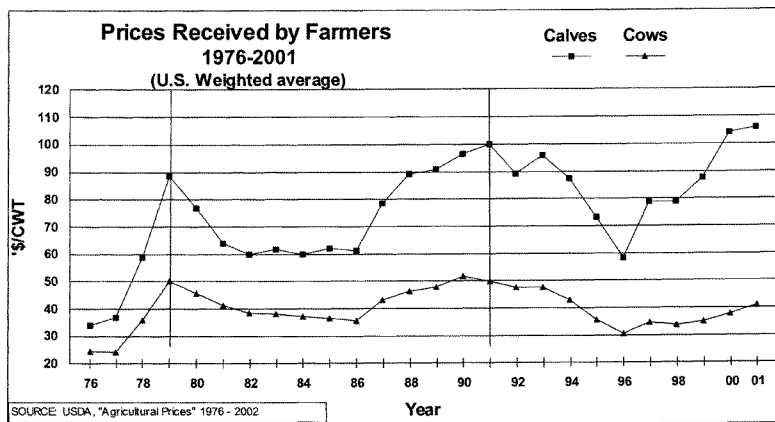
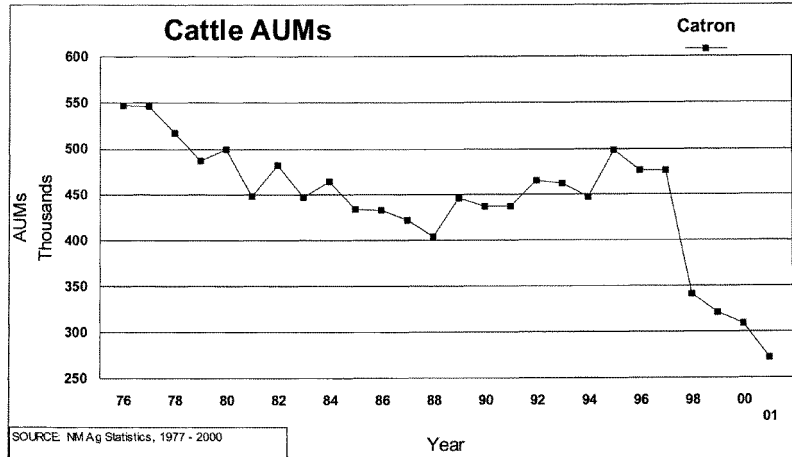


Catron County Output 1998 IMPLAN



Catron County Employee Compensation 1998 IMPLAN





547,800 AUMs 1976
 273,000 AUMs 2001 SOURCE: New Mexico Agricultural Statistics
 274,800 AUMs difference Valued at \$43.37/AUM (12 year average of value of production)

Economic Output Impact (Catron County) - Loss of 274,000 AUMs				
Industry	Direct	Indirect	Induced	Total
Agriculture (AGG)	(11,918,076)	(3,455,947)	(36,349)	(15,410,372)
Trade (AGG)	0	(469,014)	(341,412)	(810,426)
TCPU (AGG)	0	(399,644)	(106,201)	(505,845)
Services (AGG)	0	(171,562)	(314,833)	(486,395)
FIRE (AGG)	0	(290,219)	(131,299)	(421,517)
Construction (AGG)	0	(130,948)	(25,148)	(156,096)
Government (AGG)	0	(57,750)	(67,117)	(124,867)
Manufacturing (AGG)	0	(29,803)	(15,363)	(45,165)
Other (AGG)	0	0	(1,114)	(1,114)
Mining (AGG)	0	(199)	(258)	(457)
Total	(11,918,076)	(5,005,086)	(1,039,093)	(17,962,256)

SOURCE: NMSU, Modified Catron County IMPLAN Model- 1998 Dataset

Employment Impact (Catron County) - Loss of 274,000 AUMs				
Industry	Direct	Indirect	Induced	Total
Agriculture (AGG)	(186.3)	(63.1)	(0.6)	(250.0)
Trade (AGG)	0.0	(5.5)	(12.5)	(18.1)
Services (AGG)	0.0	(4.9)	(9.0)	(13.9)
Construction (AGG)	0.0	(3.2)	(0.6)	(3.7)
TCPU (AGG)	0.0	(2.7)	(1.0)	(3.6)
FIRE (AGG)	0.0	(1.4)	(0.5)	(1.9)
Government (AGG)	0.0	(0.5)	(0.6)	(1.1)
Manufacturing (AGG)	0.0	(0.2)	(0.1)	(0.3)
Other (AGG)	0.0	0.0	(0.1)	(0.1)
Mining (AGG)	0.0	(0.0)	(0.0)	(0.0)
	(186.3)	(81.6)	(25.0)	(292.9)

SOURCE: NMSU, Modified Catron County IMPLAN Model- 1998 Dataset

Ms. McMORRIS. Ms. Sease?

STATEMENT OF DEBBIE SEASE, SIERRA CLUB

Ms. SEASE. Thank you, Madam Chairwoman. On behalf of the Sierra Club's 750,000 members, we appreciate this opportunity to offer testimony on this important law. NEPA was a visionary commitment to the American people. It provides three pillars for environmental stewardship in this country. The first is a recognition that protection of the environment is a basic American value. It spans the gambit from liberal to conservative. Protecting the air we breathe, the water we drink, the wildlife that we share the planet with is a value of the American people.

The second is the requirement that the Federal government take action that when it is going to engage in something that is a major action, it consider alternatives, it provide information and that it look at the impact of those actions on the environment. It is what we call the look before you leap, it is a common sense approach.

The third critical pillar of NEPA and one that I think is particularly important in the context of these public hearings is the

recognition of the importance of public participation. NEPA is an Act about democratic processes, about information being open to people and opportunities being provided for them to give a view when the Federal government is going to take an action that affects them or their environment.

The National Environmental Policy Act is one of the nation's great success stories. I have submitted for the record a link to a report that looks at transportation projects that have been approved, not blocked, by the application of NEPA. This Committee is looking at concerns about litigation on NEPA. Litigation is a tool that allows citizens and other local stakeholders to insure that their voices are heard and that the law is being implemented. More often than not, NEPA litigation does not end up in a project being blocked. It informs the project. We believe that, by and large, it makes for better projects.

NEPA generates less than 2% of the NEPA documents in a given year generate litigation. That is a very small percentage. That percentage could be reduced if the agencies, in fact, were more proactive, did more assessment, put forward a good analysis at the front end. And it is not just environmental groups that use lawsuits to shine a light on government actions under NEPA. It was Boise Cascade in the Snowmobile Association that filed suit under NEPA provisions when President Clinton adopted the Roadless area review and protection. Now while I did not agree with their outcome, I would certainly defend their right to file that lawsuit. It is a way of having their voice heard.

The levee lawsuits that have been discussed here today, I think it is very regrettable that these are reaching the proportions of an urban legend. If you look at the facts, neither the 1977 lawsuit on levees nor the 1996 lawsuits on levees contributed to the flooding of New Orleans. In fact, the General Accounting Office, you do not have to believe the Sierra Club on this, you can look to a government agency, noted that not only did the lawsuit in 1977, was it not responsible for the flooding, but that it might have actually prevented a worse disaster than if they had gone forward with their original proposal.

In terms of grazing, I think the thing that is important to note is that only three grazing NEPA lawsuits have resulted in removal of cattle from allotments and in none of those cases was it merely over the procedure of NEPA. In each of those cases, there was also a finding that there was damage, environmental damage that was not acceptable. Ninety nine point nine percent of allotments are approved on an ongoing basis, even though the BLM and the Forest Service have both been very remiss in conducting the assessments that are required under NEPA.

You have asked what our concerns are regarding the implementation of NEPA and my statement covers these, but I will just very quickly say that recent expansion of—I am losing the actual term—of categorical exemptions, the restricting of public involvement and review and the limiting of judicial scope and the limiting of requirement of consideration of alternatives. They are all implementation aspects of NEPA that we think should be addressed. Thank you.

[The prepared statement of Ms. Sease follows:]

Statement of Debbie Sease, Sierra Club

Madame Chairwoman, Members of the Task Force on Improving the National Environmental Policy Act.

My name is Debbie Sease. I am the Legislative Director for the Sierra Club. My business address is 408 C St. N.E., Washington, DC 20002. Thank you for inviting the Sierra Club to testify at this very important hearing.

On behalf of the Sierra Club's more than 750,000 members, thank you for the opportunity to testify on the National Environmental Policy Act.

Sierra Club, founded in 1892, is the nation's oldest grass-roots environmental organization. Sierra Club's purpose is "to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environments." As concerned citizens, the Sierra Club's 750,000 members are committed to securing policies that protect, preserve and restore environmental quality.

Signed into law by President Nixon in 1969, the National Environmental Policy Act, often referred to by its acronym NEPA, safeguards our nation's air, water and lands by requiring federal agencies to provide an assessment of the environmental impact of and alternatives to any major federal action that could significantly affect the quality of the environment. Under NEPA the agencies must examine the impact on the environment, consider alternative proposals and seek to minimize harmful effects of the project, disclose the findings to the public and get citizen input into the decision making process.

NEPA guarantees that Americans affected by a federal action will get the best information about its impacts, a choice of good alternatives, and the right to have their voice heard before the government makes a final decision. By making sure that the public is informed and that alternatives are considered, NEPA has allowed communities to reconsider some damaging projects and in countless cases helped improve those projects.

At the heart of NEPA is its requirement that alternatives must be considered—including those that will minimize possible damage to public health, environment or quality of life. NEPA also lets Americans have a say before the government makes its final decision about a project.

The National Environmental Policy Act is one of the nation's great success stories. It is a law that when properly implemented saves time and money in the long run by reducing controversy, building consensus, and ensuring that a project is done right the first time. There is no need to overhaul NEPA because it works. Limiting public involvement and weakening environmental review won't avoid controversy or improve projects, it will only weaken our participatory democracy.

The Task Force is to be commended for seeking public input on the implementation of NEPA, particularly in light of CEQ reports from 1997 and 2003, both of which found that any flaws with NEPA lie in its implementation rather than the law. However, we would urge that the Task Force recognize that the 5 hearings it has held to date do not begin to provide a comprehensive picture of the public's experience with NEPA and its implementation, nor can they offer an accurate reflection of the many positive experiences and broad support for NEPA among private citizens and public officials.

Unfortunately, several of the hearing venues were changed at the last minute, moving from centrally located population centers to more isolated communities, in some cases changing from weekend to weekday schedules. In some cases proponents of NEPA were denied an opportunity to offer testimony. For example, the third hearing on July 23rd intended to cover the role of NEPA in the southern states, was moved from Houston, Texas (population 1,953,000) to the small east Texas town of Nacogdoches (population 30,000). Eight of the 10 witnesses represented mining and timber extractive industries. Local Sierra Club members asked to testify at the hearing but were turned down.

It is worth noting that some of the requirements of NEPA about which critics have complained are those that require that the public be given access to information and be given a full range of opportunities for the public to be heard, through formal comment periods, hearings, etc.

NEPA Success Stories

By making sure the public is informed and alternatives are considered, NEPA has prevented some damaging projects by offering common sense alternatives that actually have significantly improved projects. It has contributed mightily to the enhancement of road and bridge projects, toxic site clean-up, and improvement of logging and drilling projects all over the country. As part of my testimony, for the record,

I'm submitting a link to a report titled, The Road to Better Transportation Projects: Public Involvement and the NEPA Process, which outlines several examples of successful NEPA reviewed projects.

<http://www.sierraclub.org/sprawl/nepa/sprawl—report.pdf>

An example from that report that illustrates NEPA's ability to enhance projects without impeding them comes from the construction of I-70 in Colorado. A portion of I-70 through Glenwood Canyon, as originally designed, would have had massive negative impacts on environmental and public use values. Through the NEPA process, citizens successfully advocated for design changes to the road. These changes included the use of tunnels to limit noise and visual impacts, a different construction method that reduced damage to the canyon, and the inclusion of public facilities (rest stops, bike and jogging path, and a boat launch.) The project has received more than 30 awards for innovative design and environmental sensitivity.

Litigation Concerns about NEPA

Litigation is a tool that allows citizens and other local stakeholders to ensure that their voices are heard and that NEPA is being implemented. It is the law that alternatives are sought and environmental impact statements are written if a project affects a community in a "major" or "significant" way. Federal agencies are required to "look before they leap." If they do not, litigation is the last opportunity to ensure that they comply with the law. More often than not NEPA litigation does not prevent projects from happening; it only provides insurance that all alternatives are considered and the best information is available and utilized. It allows the public an opportunity to voice concerns and be part of the democratic process.

NEPA generates a proportionately low volume of litigation. Federal agencies primarily prepare Environmental Assessments (EAs), often eliminating public involvement, rather than an EIS. There are approximately 50,000 EAs, 500 draft, final and supplemental EISs for the "major" federal actions of which only about 100 lawsuits are generated, representing a mere 0.2% of the NEPA documents produced annually. (CEQ: 25th Anniversary Report).

Moreover, it is not just environmental groups that use NEPA to shine light on the government's decision-making process. For example, it was Boise Cascade Corporation and the American Council of Snowmobile Associations, among others who sued under NEPA to overturn the Clinton Administration's Roadless Rule in our national forests. Another example would be the New Mexico Cattle Growers Association suing under NEPA concerning habitat designation for the Southwestern Willow Flycatcher, an endangered species.

Save Our Wetlands vs. Rush—1977

I'd like to address the 1977 and 1996 lawsuits over which the Task Force has expressed specific concern.

After 1965's Hurricane Betsy, Congress ordered the Army Corps of Engineers to develop a flood protection plan for New Orleans. The Corps' proposed project would have built a 25-mile long barrier and gate system from the Mississippi border to the Mississippi River. As designed, the project would have choked off water exchange into Lake Pontchartrain, dooming an incredibly productive fishery. Communities around the Lake and local fisherman opposed the project because of the massive impact it would have had on the economy and environment in the region. In addition, blockading Lake Pontchartrain would have left New Orleans unable to pump out water through the lake in the event of a flood from the Mississippi River or heavy rains from a tropical storm. In the end, that is why local groups advocated for building higher and stronger levees immediately around New Orleans as a simpler and safer alternative to the Corps' plan.

In 1977, after the Army Corps of Engineers refused to evaluate the impacts of its proposed project and consider ways to reduce them, Save Our Wetlands filed suit and secured an injunction from U.S. District Judge Charles Schwartz, Jr., who concluded that the region "would be irreparably harmed" if the barrier project was allowed to continue and chastised the Army Corps of Engineers for a shoddy job. The Judge required the Corps to properly study its proposed massive new levee construction project before moving forward. The Corps eventually decided on its own to pursue an alternative plan.

Recent testimony from the Government Accountability Office indicates not only that this lawsuit wasn't responsible for the devastation of Katrina, but that it may have had a protective impact. When the GAO testified before the Energy and Water Subcommittee of the House Appropriations committee, they reported that flooding in New Orleans would have been worse if the original plan had moved forward.

In fact, Corps staff believe that flooding would have been worse if the original proposed design had been built because the storm surge would likely

have gone over the top of the barrier and floodgates, flooded Lake Pontchartrain, and gone over the original lower levees planned for the lakefront area as part of the barrier plan.

(Testimony of Anu Mittal, Director Natural Resources and Environment, General Accountability Office Before the Subcommittee on Energy and Water Development, Committee on Appropriations, House of Representatives, 9/05)

In the 1977 case, a federal judge demanded that the Army Corps provide an adequate environmental impact study as required by NEPA. Ultimately, the judge enjoined only the Lake Pontchartrain floodgates portion of the project, and not any of the proposed hundreds of miles of levees. Years later the Army Corps abandoned the project on its own, after determining that it was not the most appropriate action. In addition to the widespread local opposition from communities and fishermen the Corps was concerned that the project risked replacing one major threat with another.

Mississippi River Basin Alliance, et al. v. H. Martin Lancaster—1996

In the mid-1990's, the Army Corps of Engineers proposed raising hundreds of miles of levees 100 miles north of New Orleans in Louisiana, Arkansas, and Mississippi. Conservation groups and others did not oppose the idea of raising the levees, but they did have strong concerns about the fact that Corps wanted to drain as much as 11,000 acres of bottomland hardwood wetlands, crucial to health and safety of the Lower Mississippi Basin, to supply the construction material for those levees.

And they weren't the only ones who had concerns: The U.S. Fish and Wildlife Service, Environmental Protection Agency and the Louisiana Legislature all urged the Corps to look at how the proposed project would have impacted the area. It refused to do so. That led the Sierra Club, American Rivers, the National Wildlife Federation, Arkansas and Mississippi Wildlife Federations, and the Mississippi River Basin Alliance to take the Corps to Court. The case was soon settled, with the Corps of Engineers agreeing in 1997 to look at ways of minimizing the damage to the wetlands.

But other problems plagued the project. According to a 1997 Baton Rouge Advocate article, "Corps officials said it will take them 30 years to finish the levee work. That much time is required because funding is lacking for the projects—not because of the new environmental study, called an environmental impact statement."

Conservation groups never opposed raising the levees; just the destruction of wetlands in order to supply fill material for them. And it wasn't just conservation groups; even the Louisiana Legislature had concerns. The case was settled one year later but the Corps never had the funding to move ahead on the project.

Success with Litigation through NEPA Review

It is true that on some occasions lawsuits filed under NEPA have stopped ill-conceived projects. With the knowledge we have today we can look back with relief and gratitude for the 1972 Court Decision that enjoined the Corps of Engineers from dredging the hardwood wetlands that were recently discovered to be perhaps the last sanctuary of the Ivory-billed Woodpecker.

In 1971, shortly after NEPA's enactment, the Army Corps of Engineers advances a proposal to dredge and channelize the Cache River in Arkansas for flood control. The dredging would have had adverse effects on the vast tracts of bottomland hardwood wetland in the river basin that supports several species of wildlife, including the recently rediscovered Ivory-billed woodpecker. Environmentalists challenged the adequacy of the Corps' NEPA analysis in court, pointing out that the Corps had failed to evaluate alternatives. The court enjoined the Corps from proceeding until it fully considered alternatives (*Environmental Defense Fund v. Froehlke*, 473 F.2d 346 (8th Circuit, 1972). Subsequent public outcry over the project also led to the abandonment of the dredging project and the creation of the national wildlife refuge where the Ivory-billed woodpecker was recently sighted.

Implementation versus Changing the Law

In a 1997 report, "NEPA, A Study of its Effectiveness After Twenty-Five Years," the President's Council on Environmental Quality deemed the law successful. CEQ Chair Kathleen A. McGinty stated:

Overall what we found is that NEPA is a success—it has made agencies take a hard look at the potential environmental consequences of their actions, and it has brought the public into the agency decision making process like no other statute. In a piece of legislation barely three pages long, NEPA gave both a voice to the new national consensus to protect and improve the environment, and substance to the determination by many to work together to achieve that goal.

The 1997 CEQ study concluded that flaws with NEPA lie with agency implementation, not the law itself. Subsequently, a more recent report issued by the Bush Administration's in 2003, "Modernizing NEPA Implementation," made no recommendations for amendments to NEPA by Congress. That report also focused on improving implementation, not changing it.

Categorical Exclusions from NEPA Review

One of the most serious and growing problems in the implementation of NEPA is the increased use of "categorical exclusions" (CE). Now, CE's are being used on a regular basis to waive review requirements for road building, logging, drilling and other practices that may have devastating impacts for communities, wild lands, and wildlife habitat. Specific NEPA exclusions to date include:

- Executive Order by President Bush directing federal agencies to "expedite" energy-related permits, thereby shortchanging environmental reviews;
- "Categorical exclusions" exempting certain logging projects from standard review requirements;
- Controversial highway projects slated to be completed at an "accelerated" pace by reducing the analysis of their impacts on the community; and
- Passage of the Healthy Forests Restoration Act, which bypasses a critical component of NEPA by limiting the consideration of alternatives for projects covered by the law.

NEPA and Grazing Permits

Some have suggested that grazing permits should be exempted from NEPA—charging that NEPA review is unnecessary and redundant and has forced ranchers off of their grazing allotments. An examination of the facts does not support these allegations.

The assertion that environmental review at the point of processing a grazing permit, is redundant fails to consider that it is the terms and conditions of grazing permits that specifies when, where, how many livestock will graze. It is these decisions that will have an impact on the environment—affecting fish and wildlife, native plants and water quality on thousands of acres of land.

As for the failure to complete these reviews resulting in ranchers being forced off their allotments, 99.9% of allotments (despite widespread failure to complete the required analysis) are still subject to grazing. There are only three cases where NEPA-related litigation has stopped grazing from continuing. In each of the three cases the livestock were not removed solely because of a failure to comply with NEPA, but because it was demonstrated that serious damage was occurring. Only one of the cases affected the entire allotment.

The three cases are:

1. *National Wildlife Federation v. BLM*, 140 IBLA 85 (1997). After finding serious ongoing damage to soils, vegetation, riparian areas, water quality, wildlife habitat, and recreational sites, an administrative law judge ordered cattle temporarily kept off of 10% of one grazing allotment, while allowing grazing to continue on the remaining 90%. Later, the BLM, of its own accord, decided that grazing in the sensitive area affected by the judge's decision made no sense.
2. *Greater Yellowstone Coalition v. Bosworth*, 209 F. Supp.2d 156 (D.D.C. 2002). Bison from Yellowstone National Park were being shot as they entered the Horse Butte Allotment on the Gallatin National Forest in Montana to avoid possible transmission of brucellosis to the 147 cattle that grazed there. The Forest Service had committed to complete a NEPA analysis by 1998 to address the impacts of grazing on the allotment, including the killing of bison. As of 2002, the NEPA analysis was still not completed. In order to prevent further killing of bison, the court enjoined grazing on the allotment for one season, until the analysis could be completed.
3. *Western Watersheds Project v. Bennett*, Civ. No. 04-0181-S-BLW (D. Idaho 2005). The court found that not only had the BLM failed to comply with NEPA, but also that grazing in BLM's Jarbidge Resource Area in Nevada was causing violations of the BLM's Standards for Rangeland Health and standards in the applicable land use plan, and had contributed to an 85% decline in the population of sage grouse. The court enjoined grazing on 28 allotments covering 800,000 acres. After the court entered its order, and before any livestock were removed, the plaintiffs and the affected ranchers reached a settlement that allowed grazing to continue on the allotments.

Exempting grazing permits from the application of NEPA, as has been the effect of Congressional riders since 2000 and the Agency's failure to complete the required analysis is in fact one of the most serious problems with implementation of NEPA.

It could be best addressed by providing the agencies with sufficient funding to conduct the required assessments.

Conclusion

The National Environmental Policy Act represents a commitment that this nation made to its citizens more than a quarter century ago. It is our profound hope that the investigations of this Task Force will lead to better, stronger implementation of this landmark law, not to revisions in the law or its implementation that depart from the common sense direction of its authors to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and resources important to the Nation."

Thank you again for the opportunity to present Sierra Club's perspective.

NOTE: An attachment to Ms. Sease's statement has been retained in the Committee's official files.

Supplement to Testimony of Debbie Sease, Legislative Director, Sierra Club

Equal Access to Justice Act attorney fees:

Representative Drake inquired as to how much Equal Access to Justice Act attorney fees the Sierra Club receives.

Because it is not eligible to receive Equal Access to Justice Act attorney fees, the Sierra Club generally receives nothing in EAJA fees, and even counsel from private firms who represent the Sierra Club cannot receive fees from that representation. In NEPA cases in which an attorney representing the Sierra Club also represents other EAJA-eligible clients, he or she may receive EAJA fees on behalf of those other clients, and Sierra Club staff attorneys have received EAJA fees in those cases. In that latter category, Sierra Club attorneys have recovered a total of \$70,000 over the last 4 years, i.e. an average of \$17,500 annually. Under legal ethics laws, the Sierra Club attorneys must use these fees to support their legal work, rather than general Sierra Club budget expenses.

Oral testimony correction:

In addition, I misspoke in my oral testimony in reference to the percentage of documents annually produced by NEPA litigation. I stated the number as 2%. The actual number is .2%.

Excerpts from Sierra Club Report: The Road to Better Transportation Projects

Faster is better. For decades, this has been a basic American value. E-mail zips across the country, replacing "snail mail." Media cycles become shorter and shorter. We are tempted to cut corners to accomplish jobs more quickly. But sometimes bending or breaking the rules for the sake of speed can have disastrous consequences. Sometimes quality of work matters as much or more than speed.

This report is about a landmark law requiring the federal government to examine alternatives and seek to minimize harmful effects of federally funded projects, like highways, which have the potential to damage our health, environment, and quality of life. The National Environmental Policy Act (NEPA), which took effect in 1970, requires that federal agencies study and disclose the environmental effects of their actions and include the public in the decision-making process for federally funded projects.

Public participation and environmental review are fundamentally important to the development of high quality projects and protection of natural resources. They have contributed mightily to the enhancement of road and bridge projects all over the country and are partly responsible for the level of environmental quality Americans enjoy today. However, the public participation and environmental review processes now face serious threats from shortsighted proposals from the Bush Administration and the road construction lobby, who seek to limit these critical phases of project development by weakening provisions of NEPA as they apply to highway construction.

Oregon, Mt. Hood Corridor

EARLY PLANNING FACILITATES DESIGN

Mt. Hood highway roughly parallels a portion of the Oregon Trail and has rich cultural and historic significance. Stretching from the community of Rhododendron to its intersection with State Highway 35, it passes through the Spotted Owl

wetlands and several endangered species habitats. This 35 mile segment came under scrutiny as Mt. Hood National Forest was becoming an increasingly popular recreational destination.

As plans for expansion began, pressure to support economic development on the mountain was matched with concern by community interest groups and Native American tribal governments to protect surrounding natural and cultural resources.

Oregon's Department of Transportation (ODOT) had begun widening the entire highway piece-by-piece, but in 1994 the Federal Highway Administration intervened and indicated that the NEPA review process was needed before any additional expansion could occur.

Geoffrey Kaiser, then unit environmental/major projects manager for ODOT, wanted a method to consider the highway as a whole instead of studying segments individually. "We proposed an alternative to do a combination for Tier 1 EIS and a 20-year master plan," he said.

Completed in 1996, the resulting Mt. Hood Corridor Study yielded a set of guiding principles to be applied to all future modifications to the entire Mt. Hood Highway over the next 20 years. Establishing the guiding resource conservation principles very early in the planning stages became the critical step to avoid many later obstacles and delays in the development and design phases.

"This was the first real project where ODOT introduced NEPA in the comprehensive planning phase," Kaiser said. "It took a lot of attitude adjustment. It was a challenge for scientists to think more conceptually, but they began to realize that by being involved early in the planning phase, it lessened the detail work later," he added.

The study involved a large advisory committee representing community interest groups as well as development advocates. The group found that widening the segment alone would not alleviate congestion in the area, and thus recommended alternative solutions to mitigating the traffic. These included shuttles, real-time cameras to advise travelers of road conditions, and increased enforcement measures like parking fees to encourage off-peak visits.

Kaiser explained the study's message, "Before you leap to widening, make a good effort. So far, it has been a useful master plan," he said. The plan has since been used to support subsequent additions to the highway and other neighboring projects, such as relocating a streambed and adding wildlife crossings. "Each of these projects has to prove that the expansion does not exceed the [development] capacity of the area," said Kaiser.

Donna Kilber, the NEPA coordination manager at the time, attributes the successful study to the NEPA process. "If the NEPA process wasn't there, I doubt we would have taken the overall look like we did," said Kilber.

Montana, US-93

PUBLIC INVOLVEMENT PROMPTS CREATIVE SOLUTIONS

US-93, north of Missoula in western Montana, faces increased congestion from traffic heading toward Glacier National Park. The Montana Department of Transportation (MDT) proposed to take a 56-mile, two-lane segment of Route 93 and change it into a five-lane, undivided highway. This segment runs through the unique cultural landscape of the Flathead Indian Reservation, including territory in the heart of the Rocky Mountain ecosystem and the Ninepipe Wetlands Area, an ecosystem with thousands of kettle ponds supporting unique and fragile species of wildlife.

Under NEPA's rules, the Confederated Salish and Kootenai tribal government and grassroots citizen groups such as Flathead Resource Organization (FRO) were able to challenge MDT—first, on the validity of the initial Environmental Assessment (which evaluated only a seven-mile stretch of the 56-mile project) and later on the Environmental Impact Statement (EIS). Federal agencies are required to make and evaluate EIS reports in order to determine the consequences of a proposed action, analyze action alternatives, and share the results with other agencies and the public. By forcing MDT to do an EIS, tribal members and citizens made MDT look for creative solutions and consider alternatives for the highway, which could negatively affect safety, environmental issues, and lack of protection for tribal culture and family farms.

A Federal Highway Administration decision stipulating that the tribes and MDT must agree on the project design prompted them to hire landscape architect Jim Sipes of Jones & Jones (a firm based out of Seattle, Washington). Sipes helped create a final design agreed to by all government entities involved.

Sipes's design addressed safety, environmental, and cultural concerns about sprawl. Slow curves in the roadway are planned along the most scenic areas of the route to discourage speeding and follow the contour of the land. One mile of the

highway will be relocated around the Ninepipe Wetlands area. Additionally, an unprecedented 42 wildlife crossings and wildlife fencing will be added at the request of the Tribes to reduce harm to area wildlife.

Amanda Hardy, research ecologist at the Western Transportation Institute at Montana State University, is involved with the design and evaluation of the wildlife crossings. She said NEPA allowed "the public and agencies an opportunity to comment" so alternatives like these could be pursued.

"US-93 became a project dramatically different than what the DOT had ever done," said Sipes. "NEPA gave us more weight so our voices could be heard—without it, U.S. 93 would have been a standard four-lane highway with destructive impacts to the community," he added.

**Response to questions submitted for the record by Debbie Sease,
Legislative Director, Sierra Club**

1. In your testimony you suggest that there is a few cases where litigation has forced grazing to stop. However in each of the cases that were filed there was a request for attorney's fees under the Equal Access to Justice Act. Can you tell the Task Force about how much the Sierra Club received in fees under EAJA?

Because it is not eligible to receive Equal Access to Justice Act attorney fees, the Sierra Club generally receives nothing in EAJA fees, and even counsel from private firms who represent the Sierra Club cannot receive fees from that representation. In NEPA cases in which an attorney representing the Sierra Club also represents other EAJA-eligible clients, he or she may receive EAJA fees on behalf of those other clients, and Sierra Club staff attorneys have received EAJA fees in those cases. In that latter category, Sierra Club attorneys have recovered a total of \$70,000 over the last 4 years, i.e. an average of \$17,500 annually. Under legal ethics laws, the Sierra Club attorneys must use these fees to support their legal work, rather than general Sierra Club budget expenses.

Ms. MCMORRIS. Thank you, everyone, for being here today. Excellent testimony. I think it is going to be helpful, I know it will be helpful to the Task Force's efforts to look at NEPA and look at ways that we might be able to improve the NEPA process.

I would like to open it up for questions at this time. Mr. Radanovich? Would you like to ask some questions first, Mr. Gibbons?

Mr. GIBBONS. Thank you, Madam Chairman, and I apologize for being distracted there for a moment to our guests and panelists today. Thank you and welcome. Your testimony has been very helpful.

First of all, let me back up and make a statement and I think we all agree that many times the environmental laws of this country are and have been intended to help us protect the environment. I do not think anybody would disagree with the intent of the law itself. What has happened is a transformation over the years, a transformation from using the law to improve the environment, to improve the processes by which we operate in the environment, to a process now of prohibition of operating in the environment.

So if I ask Mr. McGarity a question, do you believe, Mr. McGarity, that every lawsuit filed that you have reviewed in the 27 years you have practiced environmental law, or taught environmental law, I should say, at the University of Texas, was filed for the specific purpose of improving the environment rather than for, say, frivolous purpose to block or stop a project?

Mr. MCGARITY. There have been lawsuits brought to block projects. I will not say, I hesitate to characterize as frivolous, because no Rule 11 sanction has ever been levied against any plaintiff in an environmental lawsuit—

Mr. GIBBONS. Then that brings my next question.

Mr. MCGARITY. Can I finish just a moment? Many of those, on the other hand, were brought by industry to stop EPA from regulating. So it definitely cuts both ways.

Mr. GIBBONS. Sure. Let me ask the question to you and then perhaps to Mr. Winn and we can get both sides of the story. If we are to use Rule 11, would it not be proper then to require those bringing a lawsuit to file a bond for the fact that if there is a frivolous purpose determined by the judge in this process or if the damages derived in the delay could be assessed to the losing party? Mr. McGarity?

Mr. MCGARITY. I think that would be a terrible thing to do, because that would advantage the industries that have lots of money to put forward and can go to the banks if need be to get money to post that bond.

Mr. GIBBONS. Well, why do you think—

Mr. MCGARITY. And it would disadvantage local groups like the group that I have helped on one occasion, the Bear Creek Citizens for the Best Environment Ever of Yocum, Texas.

Mr. GIBBONS. Well, first of all, I think when you look at seven groups who are traditionally the leaders in all of this, Mr. McGarity, it just proves when you look at the overall budget the disparity you have talked about in terms of financial wealth. Seven groups have filed 1,649 lawsuits.

Mr. Winn, do you believe that filing a bond by the plaintiff or person bringing the charge would be the proper thing to do to insure that we reduce the number of frivolous lawsuits?

Mr. WINN. I like the idea generally, but I do not know how practical—

Mr. GIBBONS. You will have to turn your mike on, please?

Mr. WINN. I do not know how practical it would be. For example, in the situation we are presented in this instance, what would be the amount of the bond? We are talking about a bond of \$100 billion or something in that vicinity. Although I think the requirement for a bond—

Mr. GIBBONS. Well, let me just tell you, I think a judge could make a determination. For example, if it is a delay, what is the delay from this year or last year to this year, for example, in the energy cost if you are a highway builder? And a lawsuit is brought for the purpose of stopping, delaying the lawsuit. We know delay is financially the death of a project in many cases, because the changes in the cost of getting the construction acquired. What we are looking at is a difference in cost that would be attributed to or loss of revenue attributed to the delay in achieving the end result, if the end result found by a court was properly and environmentally sanctioned.

Mr. WINN. Yes, sir, but normally an injunction action is the vehicle used by the plaintiff. And, of course, a bond would normally be required until after there is a final injunction hearing. Any TRO or preliminary injunction would already require a bond. So I think that that is already provided for in the law.

I do not know that in the major massive sort of situation, however, as we had with *Save our Wetlands v. Rush*, it would have been a very practical solution to require the posting of a bond.

Because you would have obviously be looking at a bond in the billions of dollars, at least that was the potential.

Mr. GIBBONS. Well, then, looking at the fact we have, and Madam Chairman, I will wrap up quickly, 1,649 lawsuits filed by seven groups, how do you achieve parity or how do you achieve some measure of change that one, does not block the door to litigation, allows for litigation when it is a reasonable and proper purpose, but yet stops the challenges for the mere purpose of defeating, delaying, stopping any project? Or, for example, in Mrs. Richards' testimony, the grazing on public land?

Mr. WINN. I think one thing that has to be required is a more complete presentation and protection by all the parties involved. If you read Judge Schwartz' opinion, and it is available on the Internet—it is an unpublished opinion, but it is available—he takes real exception to the job performed by the Corps of Engineers and its lawyers, both in their environmental impact statement and in the trial of the injunction. There is something wrong when one U.S. District Court Judge and two sets of lawyers can defeat a proposal in a program that has been authorized with, as I understand it, \$200 million of taxpayer funds by the Congress of the United States, which was studied, modeled and planned for years by the Corps of Engineers, which had as its purpose the protection of the lives and the property of hundreds of thousands of people, and yet one judge, two sets of lawyers are able to frustrate that. And that is unfortunately what happened in this instance.

Mr. GIBBONS. Thank you, Madam Chairman.

Ms. MCMORRIS. Mr. Grijalva?

Mr. GRIJALVA. Thank you, Madam Chairman. Before I ask my questions, I want to note that in yesterday's "New York Times" that the Attorney General in Louisiana is beginning an inquiry as to why the collapse of a failure of the levees there. I note with interest that not once in that article or any subsequent article is there a mention of environmental litigation as the root cause for the collapse and the failure. I note such words as malfeasance, bad design, poor materials, lack of coordination as being the areas of inquiry. I just want to note that for the record. I think that inquiry is going to go a long way to clarifying some of the discussion points that we have had here up to now.

For Mr. McGarity and Ms. Sease, a couple of questions. In your view, what is the main benefit of NEPA? And then the follow up question to that, there is no NEPA, let us presume there is none hypothetically. What then becomes the avenue for arbitrary or capricious acts by government, for the public to have redress, if there were no legal process at this point? The benefit and what if there was not any?

Mr. MCGARITY. Let me speak to that. In terms of the benefit, I am going to divert slightly. This Monday, I was at a celebration at the American Enterprise Institute for the Office of Information and Regulatory Affairs at OMB, which intervenes into agency actions and manages a process called the regulatory impact assessment process. That process had its model as NEPA. No one disagrees anymore that government action ought to be evaluated, studied, looked at the pros and the cons of government action. NEPA started that in 1970. The RIA process, President Reagan put into place

in its full form in 1981. It is the value of looking before you leap, as Ms. Sease said, of understanding what it is you are about to do before you do it and its impact on the environment, the economy and other things.

Mr. GRIJALVA. Ms. Sease?

Ms. SEASE. The only thing I would add to that in terms of a value of NEPA is the chilling effect it has on agencies putting forward projects that could not withstand public scrutiny, so the mere fact that what you propose is going to have a light shined on it that is going to be exposed to public scrutiny has actually limited the number of deeply flawed projects that agencies put forward. So that, I think, is a hidden benefit of NEPA.

And to go to your second question, if there were not a NEPA, how would we have this set of checks and balances? If there were not NEPA, we would need to invent it and I would hesitate—I guess that if there were not NEPA, that the group of people gathered here today would be talking about how to invent it, because things would be such a mess.

Mr. GRIJALVA. And on another point, Madam Chair, I had the pleasure of growing up on a ranch where my dad worked, a cattle ranch in southern Arizona. It was a good lifestyle. The reason I did not remain there or my dad did not remain there, I do not know if it is much to do with the NEPA process or grazing permits, but it had to do with the consolidations and the conglomerates beginning to take over the ranching industry. And the family that had that ranch that my dad worked for could not afford to keep ranching, period. So I think there are economic issues there that outweigh any of the points that are being made about NEPA and the grazing permits.

One last question for the two witnesses that I had called upon earlier, Mr. McGarity and Ms. Sease. One of the things that concerns me is in changes to NEPA is the effect that I think potentially disproportionate effect that already occurs with environmental issues and low income and communities of color across this country. Right now, NEPA gives these communities equal access in terms of if government is planning a project, a permitted project, these communities have access and they have a recourse in which to try to get information. My question to both of you is, if there is no NEPA, these communities would not have the bonding capacity, would not have anything other than a public process that they used to hold the government accountable. If we did not have this environmental review and did not have NEPA, what in your perception is the effect on these low income and communities of color that are already disproportionately burdened by permitted uses?

Mr. MCGARITY. Very briefly, CPR has most of the, the most prominent environmental justice scholars in the country, NCPR, so we are very concerned with environmental justice. The answer is, of course, local communities, people of color, have no opportunities to post bonds and such as that.

NEPA, the other great advantage of NEPA that I did not allude to earlier is public participation. It empowers the weakest citizen, the least powerful citizen, to make a statement to be part of the process of governmental decisionmaking that affects them.

Mr. WINN. Every state in the union, including the state—

Mr. GRIJALVA. My question goes to those two witnesses, thank you.

Ms. SEASE. I would concur with what Mr. McGarity said. A fundamental aspect of NEPA is the right to know and it is that knowledge that gives the disenfranchised communities the little power that they do have.

Mr. GRIJALVA. Thank you, Madam Chair.

Ms. MCMORRIS. Yes and just so everyone is clear, no one is proposing that we repeal NEPA. This Task Force is dedicated to looking at ways to improve the NEPA process. NEPA is considered landmark legislation and I think it is fair to say that we all agree with the intent of NEPA. What we have found is that what started out as well intentioned legislation and I think the Senator laid it out very well in his comments when he talked about some of the unintended consequences of this law and the fact that today we have pages and pages of regulatory requirements that differ from agency to agency and we have, pending right now in Court, thousands of lawsuits.

And the goal is to simply look at whether or not there is a way that we can improve this process so that the environment is, so that decisions are made which are going to have a positive impact on the environment, but ultimately that we are making decisions and that they will be environmentally friendly decisions.

Senator?

Mr. JOHNSTON. Thank you, Madam Chairman. I just wanted to add a couple of things because Katrina has figured so much here. I enjoyed Mr. McGarity's testimony. I would agree with him that the flood walls were badly designed and constructed. I would not agree that the cost was the reason that the Corps abandoned the Barrier Plan. As a matter of fact, the Barrier Plan was cheaper than the High Level Plan and always was and would be now.

I believe that there is a good chance that it would have prevented the flooding, because what the Barrier Plan was designed to do was prevent the flood surges in Lake Bourne and Lake Pontchartrain and to prevent the surge also in the MRGO. And that would have prevented a lot of the pressure and the level of the water on the flood walls and I think there is a good chance it would have prevented the flooding. There is no way you can know that for sure, but I think it probably would have done that.

Ms. MCMORRIS. And if I might be able to interrupt here just real quickly, just yesterday in response to the comment that was made that it is not certain as to whether or not the flooding would, you know, possibly have been worse, Ms. Matel, just yesterday before the Senate Energy and Water Subcommittee, changed her opinion on her earlier statement and she said that it is still to be determined as are issues related to whether a project designed to protect a category four or five hurricane could or would have been prevented. So I think it is still to be determined.

Mr. JOHNSTON. That is right and one final point. It was designed to prevent a Camille. We did not have categories at that time, at the time it was designed. But they specifically talked about Camille, preventing a Camille, and Camille was clearly a category five.

Ms. MCMORRIS. Maybe since I am still on my five minutes, I kind of got us out of order. I did want to follow up with you regarding the White House Task Force on streamlining energy projects. In your testimony, you laid out some of the unintended consequences of NEPA being lawsuits and excessive demands for information, the deadlines. Would you comment as to how you think that Task Force, what were some of the recommendations or what do you believe they might be able to help us accomplish if it were reconstituted?

Mr. JOHNSTON. Well, for example, on deadlines, you know, L&G, I believe, is one of the biggest needs this country has. I think we have to have by 2020, something like six TCF of natural gas, which can come only from L&G. So it is a great national need.

Sensing that, Congress put in a 356 day delay period. Now I believe when government agencies want to extend delays and there are all kind of deadlines and all kind of energy legislation, in order to extend a deadline, I think you ought to have to go to the Energy Task Force or CEQ or some other group and justify your demand for a delay. Because otherwise, they just go on and on. I mean, we do not have any refineries in this country. Everybody complains and complains about the oil companies. Well, why are the oil companies not building them? You cannot cite them. I mean, this process prevents you from doing it. So you ought to have an ombudsman, a task force, that rides herd on delays. Give a delay if it is necessary, but make them justify it.

These excessive demands for information. I mean, I cannot tell you how vexatious they can be. I mean, they want you to do all these studies because they are curious about the fish or the air quality or whatever. Sometimes, I mean, I could show you in projects I have been involved in where it is totally irrelevant, totally irrelevant. And yet, as a supplicant, as an applicant, you are in no position to complain. I mean, you cannot go in and say that is outrageous, because that is the same group that can deny your permit, just deny it. And then you would have to go to Court and believe me, Court is not the kind of thing that you want to subject yourself to if you are trying to build a refinery or an L&G project or a levee system, because it costs too much and it takes too long.

Ms. MCMORRIS. Thank you. Mrs. Drake?

Mrs. DRAKE. Thank you, Madam Chairman. I would like to start with Senator Johnston and I would really like to thank you for being here. It is not often that we get to meet and talk with people involved in the original legislation, so to me this is a real treat. And just to follow up on what Chairman McMorris said, none of us think that NEPA is bad. In fact, with my work on this Committee, I actually think it was brilliant to get Federal agencies talking with each other, finding out the impact on each of them and the idea of looking at alternatives.

But you would agree that since NEPA went into place, there have been many other environmental laws that have gone in place. And one of the things that I have noticed over this year and the work of this Committee is that people use NEPA for lawsuits simply because it is the easiest way to get into Court. We actually had a witness in Norfolk who said that in his testimony, that they file lawsuits under NEPA simply because they can and it is easier.

My opinion, and I would like to know your opinion, is that if someone is going to file a lawsuit, there should be something based in fact and something that they are violating, like clean water, clean air, endangered species. I mean, could you comment on that?

Mr. JOHNSTON. Well, you know, part of the problem is that at the time NEPA was passed, the environmental movement was much more united. Today, you know, we have some great mainstream organizations like the Sierra Club that, by and large I do not agree with everything the Sierra Club does, but by and large, it is a great organization. But by and large, you have all these spin off organizations that will file a lawsuit at the drop of a hat and for any reason, they are opposed to projects, you know, they are just opposed to projects. The balance is not there.

I would sort of doubt that putting up a bond is the solution. But there needs to be some group, I suggested, like a task force, that will test the reasonableness of lawsuits as well as demands for information, as well as recalcitrance on the part of Federal employees.

Mrs. DRAKE. Well, you said something very interesting. File a lawsuit at the drop of a hat, not based on fact or there is something that is wrong. Did you ever envision when NEPA was passed, and I think this is more problematic than even the idea of posting a bond, but the idea that the American people pay for the cost of that litigation? Did you think that was ever envisioned?

Mr. JOHNSTON. At the time NEPA was passed, the litigation explosion which it has generated, was really not contemplated, I do not think, by either industry or the environmentalist side. The process is a good one. The Act is a good one, by and large, it has achieved its purpose.

Mrs. DRAKE. It is a very good Act. We do not disagree with that at all. We want to see it not be used for what it was not intended to be used for.

Mr. JOHNSTON. Yes, I mean, it has gotten to the point where the threat of a lawsuit prevents people from pursuing legitimate proper projects, I mean, from either proposing them or abandoning them once NEPA litigation is commenced, because it is so expensive and so fraught with delay.

Mrs. DRAKE. Well, then, I think Mr. Winn could comment on that, too, the idea that it is used as a stall tactic, so that people give up. You know, they are tired and now the cost of the project is just too much and I think it just wears people down. So I think what you are saying, a task force or maybe something along the lines of in which instances should this be allowed to go into Court, if at all? Or should people go into Court on other items of environmental law? Mr. Winn, I do not know if you want to comment on that.

Mr. WINN. The jurisdictional basis of getting into Federal court on a NEPA suit is really not that difficult a hurdle to achieve. And here you had a situation in this particular case, the Rush case, in which a challenge to the efficiency and the effectiveness of the environmental impact statement, which is a massive document that you could have varying opinions on, was sufficient to convince one district judge to enjoin the proceeding with this project.

I might add this because I think it is very important. The levees that protect against Lake Pontchartrain and the Mississippi River overflowing did not fail. They were not compromised in any way.

The problem is, in New Orleans you have 200 miles of drainage canals. That means you have 400 miles of flood wall and those are not, in any way, levees. They are not much more than sheet pile barriers, perhaps with a decorative concrete cap. The idea that you could ever build sheet walls, 400 miles of sheet wall, that would protect against a storm surge, I suggest, is like saying you could have enough policemen to put a police officer on every corner to prevent a terrorist attack. You cannot do it. You must do something further, you must go to the source.

That is why the Barrier Plan, which would have established locks, dams and floodgates between the Gulf of Mexico which flows into Lake Bourne, which in turn flows into Lake Pontchartrain, would have limited any storm surge. In fact, in the decision itself, it is pointed out that it was thought by the Corps of Engineers that it would limit a storm surge to no more than nine feet, an amount that normally could be handled by any sort of barrier plan of levee and flood wall.

So I suggest that the problem is that we constituted one Judge, two sets of lawyers, to be able to overcome the study and determine a solution to this tremendous problem that was arrived at by the Corps of Engineers. The Corps of Engineers, perhaps at the trial of the injunction, if you read Judge Schwartz' opinion, did not do a stellar job in presenting its case and, for whatever reason, although it did revise the impact statement at least once, it failed to finally satisfy Judge Schwartz. Unfortunately, we now have the consequences of what we see in New Orleans and the southeast Louisiana area today.

Mrs. DRAKE. Thank you and just to wrap up, Madam Chairman, Mrs. Richards and Ms. Cowan, as someone who lives on the shores of the Chesapeake Bay, I knew nothing about what you do until I got involved in this Task Force and I certainly had my eyes opened in the things that you deal with. And I certainly want to thank you for what you do, it was very sad to go out and hear some of the stories where people had the number of their herd was reduced and they were actually in a position of being forced to sell their properties. I wish Mr. Grijalva was still here to talk a little bit about that.

But Ms. Sease, I wonder, and maybe you do not know today, if there is some way we can get the information of what has the Sierra Club collected through this Equal Access to Justice Act and being reimbursed for the cost? Do you know?

Ms. SEASE. I do not know off the top of my head, but I would be happy to get back to you.

Mrs. DRAKE. Thank you. We would like to have that, thank you. Thank you, Madam Chairman.

Ms. MCMORRIS. Mr. Inslee.

Mr. INSLEE. Thank you. I am always interested in these things about how people believe that NEPA is responsible for everything, including the common cold. I will just say this. NEPA was not the reason we had a President of the United States who told the public

that nobody could have anticipated that these levees would fail. That was not NEPA's fault that the President had that attitude.

It was not NEPA's fault that the FEMA director sat eating dinner and was more concerned about finishing his dinner plans than responding to the emergent nature of this problem. That was not NEPA's fault.

It was not NEPA's fault that funding had not been put through to get these jobs done in a multiple of reasons and it is not NEPA that is under investigation by the Louisiana Attorney General. It is misfeasance and malfeasance by other individuals. And if you want to investigate people, investigate Congress for not appropriating dollars to get this job done that everyone, everyone who had any sense knew was a threat because of the system of these levees and the increasing—I will not go into the other issue.

So I am just stunned at the extent that people will go to continue their attack on the environmental laws of this country. And to use a hurricane and disaster of this nature in this regard is most disturbing to me. Now maybe I am a little attached to it because I went down to the Astrodome and I volunteered for a day because I was so angry at the Federal government's inadequate and negligent response to this I just had to go. And I went down there and I helped these people for a day and did what little I could do for them. And I became very attached to them in a short period of time and I can tell you they were dignified, gracious, courageous people. And not one of them said NEPA is the problem for this, I will tell you that. They had a lot of other things to say about the lack of the Federal government's response, but talking to those people, guys that came up to me holding a bag with their wet socks and said, Congressman, this is all I got left in life, but I am alive. And I am not happy about what the Federal government did. Not one of those people said NEPA is the problem here.

It is really regrettable that this effort is going on. Now with that being said, I want to just ask Professor McGarity if there is any statistical evidence to suggest that NEPA litigation is in some explosion or that there is this infestation of NEPA litigation?

Mr. MCGARITY. No, the statistics are relatively constant, at least in terms of the lawsuits that have prevailed, where the Court has accepted the plan's position. And it is at a constant level both at the District Court and Court of Appeals. In terms of increase in litigation, yes, there has been some increase in litigation in the last five years, four to five years, and that is entirely explainable by the function that NEPA performs, which is a policing function.

It is one thing to say you really think this is a wonderful act, but if it is not an enforced act, if no one is there enforcing it, it is a meaningless act, quite frankly. And the one vehicle for enforcing the statute, since we do not have a Federal agency that is out there enforcing it, is the public, who the NEPA lawsuits—

Mr. INSLEE. Right, and that is what troubles me so much is when people continue to use this for propaganda purposes and well, there was an explosion of criminal prosecutions after the Watts riot, too. And there will be an explosion of litigation after the Parisian violence, too. Yes, there may be some increase, because we have an explosion of ignoring the environmental laws of this country under this Administration. Arsenic in our water, mercury in our air,

reductions, no meaningful response to global climate change issues. We have had a wholesale reduction of protections of the environment of this country, increasing asthma in our kids and you know what the response of this Administration is? Not to comply with NEPA, but to try to gut the clean air laws.

And yet people turn around and blame it on the citizens who are blowing the whistle on the ineffective, incompetent, incapable, uncaring actions of this Administration when it comes to this environment. You cannot scratch an issue in this country and not find an administration that has been callously indifferent to the environment of this country.

And I think we ought to be proud of some of these citizens, of holding their government to account to abide by the law. And I will tell you, in my neck of the woods in the northwest, these claims against the government have the highest win rate of probably any segment of any litigation I have ever seen. These citizens have won these lawsuits and the reason is, is because this Administration has ignored the law. Is it such a criminal activity for citizens to insist that their Federal government that they pay taxes to every April 15 at least abide by the law? Is there something morally wrong with that? I do not think so and I think we are barking up the wrong tree here. Thank you very much.

Ms. MCMORRIS. OK, you know, I find the gentleman's comments a little interesting, considering NEPA is the process by which we make these decisions. NEPA in and of itself does not have the environmental standards. It was the first of a series of environmental laws that were passed in this country. We have the Clean Air Act, we have the Clean Water Act, we have the Endangered Species Act, that do have standards, that do have requirements. NEPA is a process and I question whether or not NEPA is necessarily the policing act. It is simply the process by which we make decisions that are going to protect the environment, insure that we do have clean air and clean water.

NEPA is held up as one of the cornerstones of NEPA is the public input. Throughout the Task Force's hearings in this country, we have heard over and over that there are ways we can improve the process by which we involve the public and I think that is another example of how the Task Force is about seeing if we can improve this NEPA process. We are not out to gut NEPA.

For example, when you look at NEPA, you go through this whole—you develop the environmental impact statement and the public input is not taken until the very end, until that document is completed. Perhaps collaboration would be a better way, you know, so that the public is involved earlier on in that process and at the end there is more agreement rather than it simply being a matter of going to court or not.

I wanted to go back to Mrs. Richards and Ms. Cowan. When we think about the impact of NEPA and some of the lawsuits that we have had, that we have seen impacting BLM's ability to manage range land. I wanted you first just to comment on how it has affected you and if you had any ideas on how we could possibly reduce the amount of litigation.

Ms. RICHARDS. Thank you, Madam Chairman. I very much appreciate this opportunity. I am sorry that the one gentleman had

to leave who would hear this. A lot of times it is an economic factor that will force people to have to sell, but many times that economic factor is from litigation of frivolous lawsuits, because NEPA has proven to be successful.

I would tend to agree with this Task Force that in no way do we disagree that the public needs to have disclosure, they need to know what is going on. As a public lands rancher, we do participate in numerous collaborative efforts. What is very disturbing is, at the drop of a hat, and especially, we have had numerous cases filed in Idaho at the drop of a hat, because there has been a success rate there. I would tend to disagree with the two percent aspect. Maybe NEPA is not the complete lying factor behind it, but it is definitely one of them that forces agencies to push individuals into accepting reductions in AUMs, which is like taking the inventory out of the store when you are doing that. It definitely affects the business.

Personally, we budget over \$10,000 to \$15,000 a year within our budget in anticipation of having to go to court, where we are not even allowed in at the beginning. We have to get an intervention status when our permits are challenged in this fact. Again, we support the multiple use aspect. I do not think that NEPA, the intent of it is honorable. It is the misuse of the Act that we would ask you to be looking at and maybe again, as states in my testimony, look at those things that we have put forward into making sure that it is used for the citizens and those that need to know with the intent of the Act and not misused.

Ms. COWAN. Thank you, Madam Chairman. I come at this slightly differently than Brenda, because I work for an association and I am not at home on my family ranch. And, I too, am disappointed that Mr. Grijalva had to leave. He and I grew up about 100 miles from each other and we certainly have different views of the world at this point. And my family still is at home at the ranch and I hope to be able to, through my work, keep them there.

The BLM, in particular, with the documents I am getting in my office today and over the last couple of months, is just overwhelmed with NEPA documentation. I have several documents out of one district that are on less than a dozen head of animals. I believe the smallest one is two, two head. They had to do an environmental assessment on two head of livestock.

Admittedly, the document was only six or eight pages, but somebody had to take the time to develop that document and the cost of distributing it and, you know, monitoring what was going on with those two head would have had a whole lot more impact on the environment and a whole lot more usefulness in the environment than doing the document.

We surveyed in the State of Utah, they have recently done 40 EAs. Only three of them have not been appealed. And for every hour that the BLM spends in putting together a NEPA document, when one gets appealed, they have to go put in another three to four hours. So we are looking at huge amounts of time and cost when we could actually be doing work on the ground.

Another frustration is that a lot of these documents are done out of file cabinets. They have so much to do, so many to do, that rather than going out and doing the monitoring and overseeing what

is going on on the land, they are pulling stuff out of drawers. They are not including the allotment owners at the beginning of the process. They do not go to the people who know what is going on on the ground, who are likely to have the information. As you pointed out, they get to see the document at the end and select from a range of alternatives that they probably have not had any input in at all. So there is just a much better way to do this. We need greater involvement at the beginning. I think we need a serious look at categorical exclusions for ongoing activities. I mean, is grazing of two to ten head a major Federal activity? Where do we draw that line? Thank you.

Ms. MCMORRIS. Thank you. Mr. Inslee?

Mr. INSLEE. Thank you. I want to ask about the use of NEPA by extractive industries, which on occasion occurs. In 1995, a group of cattle ranchers sued the Clinton Administration Rangeland Reform Regulations and the ranchers argued that the Interior Department violated NEPA by preparing an inadequate EIS on the reform proposal. They lost that argument in the District Court. They did not appeal, so I guess the question is and let me ask Ms. Cowan to start with and Ms. Sease. Should those ranchers have been punished in some fashion for bringing that lawsuit, what do you think?

Ms. COWAN. Absolutely not, but if I can, in my testimony, I talked about New Mexico Cattle Growers' has been involved in litigation on environmental laws. That is where the battlefield is. If we do not go there to protect our producers and protect ourselves, it is shame on us.

And we talked about bonding a little bit before you got here. Perhaps there should be some sort of bar that has to be crossed before anybody goes into the Court, and that should apply to ranchers as well as anybody else.

Ms. SEASE. I agree that they should not be punished for filing that lawsuit. The Court will decide whether it is a valid lawsuit, but if they thought that the environmental assessment or impact statement was inadequate, they have the right and should be allowed to file a suit.

Mr. INSLEE. So there is a group now that sued over the Roadless Area Rule, a bunch of logging interests, to try to log more in the roadless areas of our national forests. And they argued that the Federal government had not complied with NEPA in passing the Roadless Area Rule. Do you think if they lose, Ms. Cowan and Sease, again, if they lose do you think they have to be punished in some fashion? Or do you think they should have to post a bond before they file that lawsuit?

Ms. SEASE. No, I think that if they lose, which I anticipate they will because I have reviewed that environmental impact process and I think that it is sufficient, their punishment is losing. And no, I do not think that they should need to file some kind of bond.

Ms. COWAN. I would agree that they do not need to be punished, and I am not a lawyer, you know, I am just looking at what goes on. I still think there needs to be some sort of prelitigation action, be it a bond or some sort of level that you reach. NEPA is just so easy to go into Court for anybody. And as I said, you know, ranchers and loggers and resource users, although I do not think ranchers are extractive. We just graze the grass and it grows back,

but they have to have the opportunity to use the same avenues that the other side, the people who will drive us off, are using.

Mr. INSLEE. Well, I am sure that the logging community will be happy about hearing your comments, but I do respect your position that it should be uniform and fair across the board. I appreciate your comments in that regard.

Let me ask about this Katrina situation because it really is troublesome to me. I am reading this "New York Times" article of yesterday and it says, "Inquiry to seek cause of levee failure." It is by the Louisiana Attorney General and he is—he or she is investigating reports where one engineering expert told a congressional panel that malfeasance might have led to the levee failures based on statements still vague and uncorroborated from a few former levee workers and their families. "Mr. Foti's inquiry comes amid mounting evidence that basic design flaws contributed to the collapse to some of the earthen levees and concrete retaining walls in New Orleans and other areas."

What I have read about this would suggest that there are other reasons, other than NEPA for these losses in New Orleans. In fact, it is interesting. We had a hearing a little earlier and I asked Mr. Jindal, who ought to know, because he is the Representative from this region, I said, do environmental laws have anything do with this disaster? And he basically said no, no. And yet, here we are. Folks, I take it, are asserting NEPA as some cause of this terrible misfortune people have had. Is there something I am missing? Yes?

Mr. JOHNSTON. It is a fact that an injunction was issued against the Barrier Plan. I mean, that is a fact, and that was issued under NEPA. I am not here to say that the decision was wrong, but I am saying that it is a fact that the injunction was issued.

Now, the question is, would the Barrier Plan have prevented the flooding? I believe there is a very good chance it would have, notwithstanding the fact that these flood walls, I believe, were clearly badly designed and probably badly constructed.

Attorney General Foti's inquiry is into the question of whether they knew or should have known that going down only ten feet into the peat was bad design. I think it was. I mean, that is my view. But it is clearly a fact that you had an injunction.

Mr. INSLEE. So if you will bear with me just a moment, Madam Chair, another way to solve this problem, to skin this cat, is for the Federal government to have done an appropriate EIS. From my knowledge, it appears it was a very scanty EIS. The Court, from my little reading of this, was probably right, that it was grossly inadequate an EIS for the Federal government to comply with its obligations under the law, do an adequate EIS and fix the levee.

Now, can we on a bipartisan basis suggest that that alternative, which is comply with the law, do an EIS, fix the levee, probably would have been a resolution of this, at least to the particular levee we are talking about here? Why is that not a better situation than reducing citizens' input on this issue?

Mr. JOHNSTON. Well, I am not here to say that the decision was wrong. You may very well be correct, actually, I have not read that decision. I was involved in the process, I was Chairman of Energy and Water at the time it came about, strong supporter of the

Barrier Plan. And I might also add there was political opposition, as well, from the North Shore, from St. Tammany Parish.

So it is not a fact in my view that you can make a clear statement that the faults of NEPA caused the flooding. But clearly, an injunction prevented the Barrier Plan, which may have prevented the flooding. And the Corps probably had a bad impact statement.

Mr. INSLEE. Yes, Mr. McGarity?

Mr. MCGARITY. I just want to make the point that there was political opposition from the North Shore and that was because these barriers would not have protected them, nor would it have protected the lower 9th Ward. I mean, I have heard several times today and I just cannot understand that, how someone would say the whole of New Orleans would not have flooded if these flood gates would have been up. That would not have prevented Lake Bourne from surging to the east of the flood walls along the industrial canal.

Mr. INSLEE. Well, I watched a movie the other day about Shakespeare and there was some line about the fault, dear Brutus, is not in our stars, it is in ourselves. And in this case, I think the fault, dear Brutus, is not in NEPA, it is in our administration, on a bipartisan basis. We have had some failures, on a bipartisan basis, to comply with the law and I think that is where we need to encourage administrations to follow the law. Thank you, Madam Chairman.

Mr. WINN. May I say this? Professor McGarity is correct, that if the 17th Street Canal breach had no effect in the lower 9th Ward in New Orleans East. But the extensive flooding that contributed to the, in the Midtown, Lakeview, Uptown and Metairie area was in the breach in the 17th Street Canal, which breach occurred in the northwest corner of the city. And if, in fact, the injunction had not stopped the construction of the flood gates that were proposed and funded and being proceeded with by the Corps of Engineers, that may well have protected against a breach in the 17th Street Canal.

Professor McGarity is correct, there is another problem with the Mississippi River Gulf Outlet and to the east of New Orleans which has to be dealt with, as well. But a great amount of the flooding was because of the breach of this canal flood wall, which was in the northwest corner of the city.

Ms. MCMORRIS. OK, OK, thank you. There has been quite an amount of discussion related to the types of lawsuits and who is filing lawsuits. I think more than anything, for me, I am just disappointed that so much of the way NEPA is implemented anymore is through lawsuits. And my goal as the Chairman of this Task Force is to see if we cannot just improve the process to hopefully avoid some of the litigation. And we heard it, you know, said that it started out as some litigating and Ms. Cowan said, you know, in response, then there are groups like hers that feel like they need to go to Court to defend themselves or be on offense in other ways.

If you look at CEQ, the Council for Environmental Quality, if you look at their data for the past three years, there are significant lawsuits. And in 2002, six times more often were the public interest groups individual citizen associations more likely to sue than

the business groups. In 2003, it was ten times more often. In 2004, it was 12 times more often.

Our goal in having you here today is to simply see if there is a way that we can do better. And I appreciate, once again, each of you taking the time to be here, to share your perspectives. It is very helpful to this Task Force and our ultimate goal is just to see if we cannot improve the process by which we make these decisions that will result in good environmental decisionmaking, but also protecting our natural resources in this country. So thank you very much, the meeting is adjourned.

[Whereupon, at 12:11 p.m., the Committee was adjourned.]

The following information was submitted for the record:

- Cannon, Hon. Chris, a Representative in Congress from the State of Utah, Statement submitted for the record
- Mississippi River Basin Alliance, Statement submitted for the record
- National Wildlife Federation, Natural Resources Defense Council, and Earthjustice, Joint letter submitted for the record
- Towers, Joseph A., Federal Attorney (Retired), U.S. Army Corps of Engineers, Statement submitted for the record

Statement of The Honorable Chris Cannon, a Representative in Congress from the State of Utah

Thank you, Mr. Chairman, for holding this important hearing regarding NEPA. Over the past few months we have had a number of field hearings throughout the country reviewing the NEPA process. During these hearings we have heard from many witnesses and have gained substantial information regarding the impact of NEPA throughout the Nation. I think that what we have learned from these hearings is that the process is much too litigious.

Over the 35 years since NEPA was enacted, volumes of law suits have frustrated the process. Environmentalists use NEPA to stall and eventually eliminate the use of natural resources on public land. As I have stated before, in my home State of Utah, the application of NEPA has had negative impacts on oil and gas development. In this time of our Nation's energy crisis, we need to guarantee that important oil and gas development is not stalled by unwarranted lawsuits.

As we are holding this final hearing with the bipartisan NEPA task force, I look forward to hearing from our witnesses. I am hopeful that we can effectively take the information that we have gained from these hearings and improve the NEPA process. It is important that we make sure that the original intent and purpose of NEPA is maintained.

**Statement submitted for the record by Cynthia Pansing,
Executive Director, Mississippi River Basin Alliance**

We are submitting the following comments to the House Resources Committee on behalf of the Mississippi River Basin Alliance (MRBA), a non-profit organization with over 130 member groups throughout the basin. MRBA is dedicated to the protection and restoration of the health of the Mississippi River system and the communities who depend on it. We are also committed to helping citizens and communities participate in the decision-making process about environmental issues that affect their lives, which is one of the key benefits that the National Environmental Policy Act (NEPA) delivers to the American people.

We are concerned that a number of attempts to discredit and weaken NEPA have exploited the recent tragic events related to Hurricane Katrina, in particular the failure of the levees in New Orleans that resulted in catastrophic flooding of the city. These allegations surfaced initially in an article by the Competitive Enterprise Institute that ran in National Review Online on September 8, 2005, which suggested that lawsuits by environmental groups somehow contributed to the interior levee failures that flooded New Orleans.

The National Review article focused on two lawsuits, one of which was a suit initiated by MRBA and several organizations against the Vicksburg District of the Corps

of Engineers in 1996. The article misrepresented several key facts about this lawsuit. Contrary to the article's assertions, this lawsuit concerned levees located outside New Orleans, in some cases by over one hundred miles. Nor did the groups involved in the lawsuit oppose all levees or elevate the interests of endangered species above the protection of human lives and communities. The lawsuit was aimed at ensuring that the Corps followed the law in utilizing sediment sources for levee construction and consulted with other federal agencies.

The lessons learned from the second lawsuit bear mentioning here, though MRBA was not involved in bringing it about. Filed in 1977 by the organization Save Our Wetlands, Inc. over the Lake Pontchartrain and Vicinity Hurricane Barrier Project, this lawsuit has since been highlighted by some opponents of NEPA as an example of why the law needs to be changed. It is important to note, however, that the General Accounting Office, in a report issued September 28, 2005, stated that

"None of the changes made to the project, however, are believed to have had any role in the levee breaches recently experienced as the alternate design selected was expected to provide the same level of protection. In fact, Corps officials believe that flooding would have been worse if the original proposed design had been built." (www.gao.gov/new.items/d051050t.pdf) [Emphasis added]

A growing body of information about the levee failures in New Orleans has been emerging from several post-hurricane investigations, which are being ably reported by the Times-Picayune newspaper, available to everyone at www.nola.org. These investigations are revealing pervasive design flaws in the levees that failed, as well as the tragic fact that the city did not have the degree of hurricane protection that it had been promised and had every right to expect.

NEPA was clearly not a factor in the levee collapses. NEPA is just the opposite—a safeguard of the public interest and responsible policy.

A vivid example of damage caused by a project that was built prior to NEPA can be seen just outside of New Orleans: the Mississippi River Gulf Outlet (MRGO), a navigation channel completed in the mid-1960s. As it was built, there were voices raised in opposition to MRGO, based on local and scientific knowledge of the wetland ecosystems involved and their vital importance to the integrity of the coastal landscape. Since its construction, the MRGO has caused the loss of thousands of acres of protective coastal marshes. Over the years, local citizens repeatedly raised concerns over the years about its potential for funneling storm surges from hurricanes directly into populated areas in St. Bernard Parish and the eastern section of New Orleans. This would not have happened with NEPA in place before MRGO was constructed.

At the heart of NEPA is its requirement that alternatives must be considered, including those that minimize damage to our health, communities, environment, and quality of life. Comparing and seeking input on the merits of several alternatives is a core requirement of NEPA. It is the mechanism that forces us all, including federal agencies, to think outside of the box when approaching projects that may harm our environment or public health.'

NEPA also protects and empowers the public. It ensures that the local community is not left out of decisions, and it requires the government to base these decisions on good information. Maintaining and strengthening the community's voice in decisions on federal projects is critical to making wise choices that enhance the quality of life in our communities, and one of the best reasons for keeping NEPA strong and effective.

We urge you to take the leadership necessary to preserve this fundamental set of laws that helps protect every American's quality of life and will ensure that New Orleanians will have the hope of a healthier and more sustainable city once it is rebuilt.

[A letter submitted for the record by the National Wildlife Federation, Natural Resources Defense Council, and Earthjustice follows:]

November 23, 2005

Hon. Cathy McMorris, Chairwoman
Hon. Tom Udall, Ranking Member
Task Force on Improving the National Environmental Policy Act
House Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Comments of the National Wildlife Federation, the Natural Resources Defense Council, and Earthjustice on the Benefits of the National Environmental Policy Act to Federal Rangelands

Dear Representatives McMorris and Udall:

The National Wildlife Federation ("NWF"), Natural Resources Defense Council ("NRDC"), and Earthjustice submit these comments to supplement the Committee's November 10, 2005 hearing on NEPA Litigation, The Causes, Effects and Solutions. These comments address issues raised by the case studies discussed during the November 10th hearing on the impacts of NEPA litigation on federally permitted livestock grazing.

NWF is a non-profit conservation organization with over one million members dedicated to conserving wildlife and other natural resources, including improving the management of livestock grazing on the public lands. NRDC is a non-profit environmental organization with more than a half million members that plays a leading role in a diverse range of federal land and resource management issues, including livestock grazing. Earthjustice is a nonprofit public interest law firm dedicated to protecting the magnificent places, natural resources, and wildlife of this earth and to defending the right of all people to a healthy environment.

All three organizations have a long history of concern for the management and current conditions of federal lands administered by the Bureau of Land Management and Forest Service that are grazed by privately owned domestic livestock. Over the last thirty years, NWF, NRDC, Earthjustice, and their members have worked with these agencies and ranchers to improve natural resources and range-land conditions on grazing allotments in the western United States, have extensively commented on and participated in agency proposals to modify their rules and procedures for managing livestock grazing, have met with and provided information to Members of Congress about federal lands grazing, and when necessary to protect natural resources, have sued these agencies for failure to comply with NEPA when managing federal rangelands.

These comments endorse and adopt part of the written testimony submitted by law professor Thomas McGarity, who testified during the November 10th Task Force hearing in Washington D.C. The portion of Professor McGarity's testimony that we embrace and that is relevant to NEPA and livestock grazing was prepared by Arizona State University law professor Joe Feller: NEPA Has Not Unduly Interfered with the Proper Issuance of BLM and Forest Service Grazing Permits. McGarity testimony, pp. 8-12.

COMMENTS

1. NEPA's collection of site-specific information about federal rangelands, and its evaluation of alternative means of managing grazing, benefits all natural resources, including livestock grazing, by enhancing the health of rangelands. The information about the condition of federal grazing allotments that is gathered and analyzed during the NEPA process is critical to assessing the health of those rangelands, and deciding how they should be managed to benefit all users, including ranchers holding federal grazing permits. Through the NEPA process, BLM and the Forest Service assess forage and water conditions on an allotment, and consider practical methods to improve and protect forage, water, wildlife, and other natural resources, while supporting livestock grazing.

The end result is healthier federal rangelands, which redounds to the benefit of all public lands users, including grazing permittees. Moreover, during the NEPA-mandated consideration of alternatives, the agencies are able to work with ranchers to devise the best means to achieve ranching needs. In our experience, when livestock permittees, the agency, and interested members of the public work together during the NEPA process, the result is management that helps to ensure the long-term health of federal allotments, which support livestock grazing as well as wildlife and other natural resources.

2. The NEPA process allows the agency to inform ranchers, the public, other agencies, and state and local officials about plans to manage federal rangelands, thereby avoiding future conflict. When agencies use the NEPA process to evaluate proposals to graze livestock on federal lands, information about the proposals, their benefits and consequences, and the health of the land are available to ranchers, the public, other agencies, and state and local officials, all of whom are allowed to participate in the process. While providing information to and an opportunity for others to comment on livestock grazing proposals for federal lands does take time, it yields the substantial benefit of notifying those interested in the

federal lands, thereby heading off potential controversy and management problems after the decision is made.

In our experience, some of the smoothest and most successful federal lands grazing operations evolved from a NEPA process that brought various resources, interests, and talents together to establish the grazing management plans. This resulted in less controversy, to the benefit of the ranchers, wildlife, and other federal land users.

3. NEPA litigation has never shut down grazing solely because of an agency's failure to comply with the statute. As Professor Feller explains on page 11 of Professor McGarity's written testimony, in the thirty-five years since the enactment of NEPA, there have, to Professor Feller's knowledge, only been three cases in which livestock were ordered out of an area in connection with NEPA litigation. In all three cases, the agency not only failed to comply with NEPA, but there was also proof that livestock grazing was causing very serious damage to valuable natural resources. There has never been a case in which livestock have been removed solely because of the agency's failure to comply with NEPA. Moreover, in the three cases where the court ordered a cessation of grazing, the impact on the ranchers was ameliorated. In one case the reduction was slight (10% cutback), in another there was a settlement allowing grazing to continue despite the court's order, and in the third the livestock were moved to other federal lands where they were allowed to graze, and their owners, the ranchers, were financially compensated by conservationists for the relocation.

4. Congress has already taken action to ensure that compliance with NEPA will not delay the renewal of federal grazing permits. Professor Feller explains on page 12 of Professor McGarity's written testimony that Congress has acted to allay fears of ranchers that agency failures to comply with NEPA could interfere with their grazing operations. Since before 2000, Congress has included provisions in annual appropriations legislation specifying that when a grazing permit would expire before the processing of a new permit in compliance with NEPA and other applicable laws can be completed, a new permit shall be issued with the same terms and conditions as the expiring permit. A provision in the 2003 appropriations bill extended this protection for ranchers through 2008.

5. Contrary to the impression provided during the November 10th hearing, ranchers have recognized the need for and value of the NEPA process. Over the course of our long involvement in NEPA processes concerning grazing management, we have met and worked with ranchers who acknowledged the importance of public participation in decisions about the management of publicly-owned rangelands. Moreover, ranchers and rancher organizations have themselves brought NEPA challenges to grazing and grazing-related decisions.

For example, in 1996 the Tenth Circuit Court of Appeals affirmed the New Mexico Federal District Court's ruling in a NEPA case brought by rancher-attorney Karen Budd-Falen on behalf of the Catron County (New Mexico) Board of Commissioners. The courts held that the Secretary of Interior must comply with NEPA when designating critical habitat under the Endangered Species Act. Catron County Board of Commissioners, New Mexico v. United States Fish and Wildlife Service, 75 F. 3d 1429 (10th Cir. 1996). In 1996 the Public Lands Council, National Cattlemen's Association, and American Sheep Industry Association, among others, challenged the BLM's revised grazing regulations in the Wyoming Federal District Court. Among their objections to the regulatory changes were claims that the BLM violated NEPA because the Final Environmental Impact Statement failed to: (1) address areas of scientific controversy; (2) address material public comments; and (3) consider the environmental effects of the revised regulations. The district court ruled against the ranchers on all of their NEPA claims. Public Lands Council v. United States Department of Interior, 929 F.Supp. 1436 (D.Wyo. 1996), *aff'd* in part and *rev'd* in part sub nom. Public Lands Council v. Babbitt, 167 F. 3d 1287 (10th Cir. 1999), *aff'd*, 529 U.S. 728 (2000).

6. Congress should better fund BLM and the Forest Service to monitor grazing and comply with NEPA, because better oversight, information, and analyses benefit ranchers, rangelands, and the public's natural resources. Unless Congress provides adequate funds to BLM and the Forest Service to monitor and evaluate grazing allotments, including funds to support prompt NEPA evaluations, the health of federal rangelands can stagnate. Without funds to carry out NEPA analyses, monitoring, and implementation, the agencies cannot assess the value of mitigation measures (including range improvements) or consider the best way to manage livestock while enhancing and protecting other uses of federal lands.

The backlog of agency grazing permit renewals awaiting NEPA analysis that motivated Congress to waive NEPA compliance for the renewal of permits (see #4 above), is primarily the result of tight budgets that have prevented agencies from

keeping up to speed. With their limited budgets, BLM and the Forest Service are making only slow, but steady, progress in dealing with the backlog of NEPA analyses for grazing permit renewals. For example, according to Congressional testimony by the BLM, in 2003 BLM had completed its NEPA analyses on 84% of the permits it had renewed without up-front NEPA compliance by relying on Congress's waivers in appropriations bills. That percentage increased slightly to 85% in 2004, and remained the same in 2005.

While the Forest Service's NEPA processing of its backlog of automatically renewed grazing permits has also been increasing, the agency has made less progress than the BLM in dealing with its backlog. In 2003 it had processed (under NEPA) 34% of the automatically renewed permits, in 2004, 38%, and in 2005, 44%.

More funding for both agencies would allow them to catch up with their NEPA analyses, with the result that they could better assess, manage, and improve federal rangelands for the benefit of all public users.

CONCLUSION

We appreciate the opportunity to provide these comments. If you have questions or wish to discuss our comments in more detail, please feel free to contact Tom Lustig at the National Wildlife Federation (303/441-5158) or Johanna Wald at the Natural Resources Defense Council (415/875-6100).

Respectfully submitted,

Thomas D. Lustig
Senior Staff Attorney
National Wildlife Federation

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Senior Attorney
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Sara W. Tucker
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[NOTE: Additional information submitted for the record has been retained in the Committee's official files.]

